

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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TRANSCRIPT OF RECORD

United States Court of Appeals for the
District of Columbia

APRIL TERM, 1938.

No. 7216

328

JAMES B. FLYNN, TRUSTEE, AND GEORGE F.
HOOVER, TRUSTEE, APPELLANTS,

vs.

ELIZABETH BROOKS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

FILED AUGUST 1, 1938

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United States Court of Appeals for the District of Columbia

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United States Court of Appeals for the District of Columbia

A. In the District Court of the United States
For the District of Columbia
No. 66770 In Equity

ELIZABETH BROOKS, *Plaintiff*,

vs.

JAMES B. FLYNN, Trustee, GEORGE F. HOOVER, Trustee, and
JUSTUS S. WARDELL, Receiver, Northeast Savings Bank,
Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, That in the District Court of the
United States for the District of Columbia, at the
City of Washington, in said District, at the times
hereinafter mentioned, the following papers were
filed and proceedings had, in the above-entitled
cause, to wit:—

1 *Petition to Remove Trustees, &c.*

Filed March 19 1938

In the District Court of the United States
For the District of Columbia

Holding An Equity Court

Equity Number 66770

ELIZABETH BROOKS, 1247 Kenilworth Ave., N. E., *Plaintiff*,
vs.

JAMES B. FLYNN, Trustee, Washington Loan & Trust Bldg.,
GEORGE F. HOOVER, Trustee, 800 H Street, N. E., JUSTUS
S. WARDELL, Receiver, NORTHEAST SAVINGS BANK, A
Corporation, 1406 G Street, N. W., *Defendants*.

To the Justice of the District Court of the United States
for the District of Columbia, holding an Equity Court:

The petition of Elizabeth Brooks respectfully represents
unto the Court as follows:

1.

That she is a citizen of the United States and a resident of the District of Columbia and files this suit in her own right, and also in behalf of Frederick M. Brooks, Dorothy Brooks Heard and Bruce E. Brooks, her children.

2.

That the defendants Flynn and Hoover are citizens of the United States and residents of the District of Columbia, and are sued as trustees under a certain deed of trust recorded in Liber 6581, at folio 75, et seq; that the defendant, Justus S. Wardell, is a citizen of the United States, and at present residing in the District of Columbia, and is sued as the Receiver of the Northeast Savings Bank, a corporation, now in process of liquidation, the holder and owner
2 of the notes secured by the aforesaid deed of trust.

3.

That the plaintiff and her children aforesaid, being the widow and children of Frederick U. Brooks, deceased, who died intestate on the 16th day of August, 1930, are the equitable owners in fee simple of two certain parcels of real estate situated in the District, known and described as parcels 184/32 and 184/33, also known as land and premises 1247 Kenilworth Avenue, Northeast.

4.

That on, to wit, the 27th day of June, 1931, the plaintiff and her children made, executed and delivered a certain deed of trust, naming the defendants Flynn and Hoover as trustees, said deed of trust was to secure the payment of the sum of Forty-one Hundred (\$4100.00) Dollars to the Northeast Savings Bank, for money loaned; that the said deed of trust was duly recorded in Liber 6581, at Folio 75, et seq; a copy of said deed of trust is attached hereto and prayed to be considered a part hereof as though fully and at length set out herein.

5.

That the plaintiff has now sufficient money on deposit in the District Title Company to settle in full all claims which the receiver of the Northeast Savings Bank, the present

owner and holder of the aforesaid trust notes claims is due the Bank under the terms of the aforesaid trust and in accordance with the final decree in Equity Cause 63-558, which decree is hereby incorporated herein by reference.

6.

That, notwithstanding the plaintiff's ability and willingness to meet in full the claims of the aforesaid holder of the note, the defendant trustees, Flynn and Hoover, have insisted upon the payment to them of a sum of Seven Hundred
3 Twenty-five (\$725.00) Dollars as principal and One
Hundred Forty-four Dollars and Ninety-eight Cents
(\$144.98) as interest thereon, in addition to the sum demanded of the plaintiff by the aforesaid note holder; that the plaintiff was advised of this amount by the counsel for the trustees on Saturday, March 12, 1938, two days prior to a sale scheduled for the property on the 14th day of March, 1938.

7.

That the trustees have advised the plaintiff that they would not release said deed of trust, unless this sum were paid to them, although the plaintiff stood ready, willing and able to discharge everything required of her by the noteholder and in accordance with the final decree in Equity Cause 63-558.

8.

That defendant trustees are insisting upon the sum set out supra pursuant to an alleged assignment of mortgage interest which they, the trustees, have entered into with a certain fire insurance company; that the plaintiff avers that the said assignment of mortgage interest was made or entered into by the defendant trustees with the aforesaid fire insurance company without right or authority on the part of the trustees, and contrary to the terms of the deed of trust, as aforesaid, and in violation of Section 522 of the D. C. Code.

9.

That the trustees, by their hostile conduct, have caused the plaintiff considerable damage, by forcing her to deposit the sum of Seventy-four Dollars and Fifty Cents (\$74.50) as a guarantee of the charges incident to a postponement

before they would consent to a postponement of the afore-said sale for a period of two weeks, although the note holder had instructed the trustees that a guarantee of costs incident to the postponement would suffice, when they
4 knew that their conduct had caused the conflict; and that they further damaged the plaintiff by forcing the filing of this suit.

10.

That in addition to the sum of Seventy-four Dollars and Fifty Cents (\$74.50), the trustees have a deposit of Three Hundred (\$300.00) Dollars as from one Leon Williams, which deposit they have been ordered to expend in accordance with the final decree in Equity 63-558.

11.

That the defendant trustees have, in addition to their attempted assignment of a mortgage interest, in the plaintiff's property, shown hostility generally toward the plaintiff, by their refusal to accept on Monday morning, March 14, 1938, when first proffered to the defendant trustee Hoover, a sum to safeguard the trustees as a condition precedent to a postponement, after the said note holder had instructed them in a letter, dated March 12, 1938, that such a guarantee would be acceptable to the said note holder; that they have further shown hostility in that they have failed, refused, neglected, to negotiate with the fire insurance company for the purpose of clearing up the situation for which they are alone responsible; that the plaintiff has been advised that the note holder will consent to no further postponement; that the plaintiff is advised that because of their conduct and hostility, the trustees have shown their inability to act in a disinterested manner as required of trustees.

Wherefore, the Premises Considered, Your Plaintiff Prays:

1.

That a rule be issued by this Court requiring the defendants to appear herein on or before the tenth day after service, and show cause, if any they have, why the
5 trustees herein should not be removed and others substituted in their place and stead.

2.

That the removed trustees be required to deliver over to the substitute trustees all monies held by them pursuant to any exercise of their office under this trust.

3.

That the alleged assignment of mortgage interest be declared to be null and void and of no effect as a lien under the aforesaid deed of trust.

4.

That defendant trustees pay a reasonable sum as counsel fee to the plaintiff.

5.

And for such other and further relief as the nature of the case may require and to the Court may seem meet and proper.

ELIZABETH BROOKS.

DISTRICT OF COLUMBIA, ss:

I do solmenly swear that I have read the above petition by me subscribed and know the contents thereof; that the matters stated therein are true to the best of my knowledge and belief.

ELIZABETH BROOKS.

Subscribed and sworn to before me this 19th day of March, 1938.

BROOKS T SANDERS

(Seal)

Notary Public, D. C.

THURMAN L. DODSON

HORACE O. POLLARD

Attorneys for Plaintiff

6

No. 22827

Recorded July 30, 1931
at 2:25 P. M.

Trust

This Deed made this 27 day of June, A.D. 1931 by and between Elizabeth Brooks, widow, of Frederick U. Brooks, deceased; and Joseph Brooks, Frederick M. Brooks, Dor-

othy A. Brooks and Bruce E. Brooks, all adults and unmarried, and all children and heirs at law of the said Frederick U. Brooks, deceased, parties of the first part, and George F. Hoover and James B. Flynn, Trustees, parties of the second part:

Whereas, the said Elizabeth Brooks, Frederick M. Brooks, Joseph Brooks, Dorothy A. Brooks and Bruce E. Brooks are justly indebted unto the Northeast Savings Bank, of Washington D.C. in the full sum of Forty-one hundred (\$4100.00) dollars representing money loaned and advanced by the said Northeast Savings Bank to the said parties of the first part as is evidenced by their four (4) certain promissory notes of even date herewith executed and delivered by the said parties of the first part, the said notes being payable on or before three (3) years after date, with interest at the rate of 6% per annum, said interest payable semi-annually, the said notes being numbered Nos. 1, 2, 3, and 4 respectively; notes numbered 1, 2 & 3 being in and for the sum of \$1000.00 each and note numbered 4 being in and for the sum of \$1,100.00.

And Whereas, the parties of the first part desire to secure the prompt payment of said debt and interest thereon, when and as the same shall become due and payable, and all costs and expenses incurred in respect thereto, including reasonable counsel fees incurred or paid by the said parties of the second part or substituted trustee, or by any person hereby secured, on account of any litigation at law or in equity which may arise in respect to this trust or the property hereinafter mentioned, and of all money which may be advanced as provided herein, with interest
7 on all such costs and advances from the date thereof.

Now, Therefore, This Indenture Witnesseth, that the parties of the first part, in consideration of the premises, and of one dollar, lawful money of the United States of America to them in hand paid by the parties of the second part the receipt of which before the sealing and delivery of these presents is hereby acknowledged, have granted, and do hereby grant unto the parties of the second part, in fee simple, the following described land and premises, situate in the City of Washington, District of Columbia, known and distinguished as parts of the tracts of land called "Fife" and "Fife enlarged" being parts of the farm on

which Levi Sherriff resided at the time of his death, and being also part of the land conveyed to Moses Orr and Joseph Brooks by Deed recorded in Liber 659 folio 439 among the Land Records of the District of Columbia, described in accordance with plat of survey recorded in Survey Book 53 page 260 of the Records of the Office of the Surveyor of the District of Columbia, in two parcels as follows:—

Parcel 1. Beginning for the same at a gas pipe on the Southeasterly line of Kenilworth Avenue, formerly Anacostia Road, at the end of the two following courses and distances, from the Southwesterly corner of the tract of land conveyed to Orr and Brooks as aforesaid (which corner is also the point of intersection on the Northeasterly line of the land conveyed to the Baltimore and Potomac Railroad by Deed recorded in Liber 674 folio 295 of aforesaid Land Records, with the Southeasterly line of Kenilworth Avenue, formerly Anacostia Road, (1) North 35 degrees 10 minutes East 440.95 feet with the line of Kenilworth Avenue, (2) Still with said Avenue, North 37 degrees 51 minutes East 316.57 feet to the point of beginning hereof, thence along said Avenue with said last mentioned course, 103.36 feet

to a gas pipe; thence South 52 degrees 9 minutes East 300.95 feet to a gas pipe on the Northwesterly line of the land conveyed to “The Manor Real Estate and Trust Company” by Deeds recorded in Liber 4254 folios 358 and 361 respectively of said Land Records, thence with said last mentioned line, South 45 degrees 2 minutes West, 104.18 feet to a gas pipe; thence North 52 degrees 9 minutes West 287.92 feet to the point of beginning,—Parcel

2. Beginning for the same at a gas pipe on the Southeasterly line of Kenilworth Avenue, formerly Anacostia Road, at the end of the two following course - and distances from the Southwesterly corner of the tract of land conveyed to Orr and Brooks as aforesaid (which corner is also the point of intersection of the Northeasterly line of the land conveyed to the Baltimore and Potomac Railroad, as by Deed recorded in Liber 674 folio 295 of aforesaid Land Records, with the Southeasterly line of Kenilworth Avenue, formerly Anacostia Road, (1) North 35 degrees 10 minutes East 440.95 feet with the line of Kenilworth Avenue, (2) still with said Avenue, North 37 degrees 51 minutes East

419.93 feet to the point of beginning hereof, thence along said Avenue with last mentioned course 195.28 feet to a stone; thence still with said Avenue, North 31 degrees 21 minutes East 331.19 feet to the Northeasterly boundary of the land conveyed to the said Orr and Brooks as aforesaid, thence with the said boundary, the two following courses and distances (1) South 55 degrees 14 minutes 30 seconds East 219.55 feet; (2) South 44 degrees 51 minutes 30 seconds East 185.32 feet to the Northwesterly line of the land conveyed to "The Manor Real Estate and Trust Company" by deeds recorded in Liber 4254 folios 358 and 361 respectively of said Land Records; thence with said last mentioned line, South 45 degrees 2 minutes West 516.72 feet to a gas pipe; thence North 52 degrees 9 minutes West 300.95 feet to the point of beginning,—Note:—At the date hereof,

9 the above described land is designated on the Books of the Assessor of the District of Columbia as Parcels 184/32 and 184/33,—together with all the improvements in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity, or otherwise however, of the parties of the first part, of, in, to, or out of the said land and premises.

In and upon the trusts, nevertheless, hereinafter declared; that is to say: In trust to permit said parties of the first part, their heirs or assigns, to use and occupy the said described land and premises, and the rents, issues, and profits thereof, to take, have, and apply to and for their *their* sole use and benefit, until default be made in the payment of said four (4) promissory notes hereby secured or any instalment of interest thereon, when and as the same shall become due and payable, or any proper cost or expense in and about the same as hereinafter provided.

And, upon the full payment of all of said notes and the interest thereon, and all moneys advanced or expended as herein provided, and all other proper costs, charges, commissions, half-commissions and expenses, at any time before the sale hereinafter provided for to release and reconvey the said described premises unto the said parties of the first part, their heirs or assigns, at their cost.

And upon this further trust, upon any default or failure being made in the payment of said notes or of any instalment of principal or interest thereon, when and as the same

shall become due and payable, or upon default being made in the payment, after demand therefor, of any money advances as herein provided for, or of any proper cost, charge, commission, or expense in and about the same, then any at any time thereafter the said parties of the second part or the survivor of them or the trustee acting in the

10 execution of this trust shall have the power and it shall be their or his duty thereafter to sell, and in case of any default of any purchaser to resell the said described land and premises at public auction, upon such terms and conditions, in such parcel, at such time and place, and after such previous public advertisement as the parties of the second part or the survivor of them or the trustee acting in the execution of this trust shall deem advantageous and proper; and to convey the same in fee simple, upon compliance with the terms of sale, to, and at the cost, of the purchaser, or purchasers thereof, who shall not be required to see to the application of the purchase money; and of the proceeds of said sale or sales: Firstly, to pay all proper costs, charges, and expenses, including all fees and costs herein provided for, and all moneys advanced for taxes, insurance, and assessments, with interest thereon as provided herein, and all taxes, general and special, due upon said land and premises at time of sale, and to retain as compensation a commission of Five per centum on the amount of the said sale or sales: Secondly, to pay whatever may then remain unpaid of said Four (4) notes, whether the same shall be due or not, and the interest thereon to date of payment, it being agreed that said notes shall, upon such sale being made, before the maturity of said notes, be and become immediately due and payable at the election of the holder thereof; and, Lastly, to pay the remainder of said proceeds, if any there be, to said parties of the first part, their heirs or assigns, upon the delivery and surrender to the purchaser, his, her or their heirs or assigns, of possession of the premises so as aforesaid sold and conveyed, less the expense, if any, of obtaining possession.

And the said parties of the first part do hereby agree at their own cost, during all the time wherein any part of the matter hereby secured shall be unsettled or unpaid to keep the said improvements insured against
11 loss by fire in the full sum of Forty one Hundred

(\$4100.00) Dollars, in the name and to the satisfaction of the parties of the second part, or substituted trustee, in such fire insurance company or companies as the said parties of the second part may select, who shall apply whatever may be received therefrom to the payment of the matter hereby secured, whether due or not, unless the party entitled to receive shall waive the right to have the same so applied; and also to pay all taxes and assessments, both general and special, that may be assessed against or become due on said land and premises during the continuance of this trust and that upon any neglect or default to so insure, or to pay taxes and assessments, any party hereby secured may have said improvements insured and pay said taxes and assessments, and the expenses thereof shall be a charge hereby secured and bear interest at the rate of six per centum per annum from the time of such payment.

And, it is further agreed that if the said property shall be advertised for sale, as herein provided, and not sold, the trustee or trustees acting shall be entitled to one-half the commission above provided, to be computed on the amount of the debt hereby secured.

And, the said parties of the first part covenant that they will warrant specially the land and premises hereby conveyed, and that they will execute such further assurances of said land as may be requisite or necessary.

In Witness whereof, the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

Signed, sealed and delivered in the presence of—

	DOROTHY A. BROOKS	(Seal)
	ELIZABETH BROOKS	(Seal)
	JOSEPH BROOKS	(Seal)
12	BRUCE E. BROOKS	(Seal)
	FREDERICK M. BROOKS	(Seal)

LEONARD A. KIRTON

(Notarial Seal)

Notary Public

Notary Public, New York, County
N. Y. Clk's No. 129, Reg. No. 3-K-110

Term Expires March 30, 1933.

UNITED STATES OF AMERICA

District of Columbia, to wit:

I, W. R. Lewis, a Notary Public in and for the District of Columbia, Do Hereby Certify that Elizabeth Brooks, Joseph Brooks, Dorothy A. Brooks and Bruce E. Brooks parties to a certain Deed, bearing date on the 27 day of June A. D. 1931, and hereto annexed, personally appeared before me in said District the said Elizabeth Brooks, Joseph Brooks, Dorothy A. Brooks and Bruce E. Brooks, being personally well known to me as the persons who executed the said deed, and acknowledged the same to be their act and deed.

Given under my hand and seal this 30th day of June A.D. 1931.

(Notarial Seal)

W. R. LEWIS
Notary Public, D. C.

STATE OF NEW YORK.

County of New York.

I, Leonard A. Kirton a Notary Public in and for the State and County aforesaid, Do Hereby Certify that Frederick M. Brooks, party to a certain Deed, bearing date on the 27th day of June, A. D. 1931 and hereto annexed, personally appeared before me in said State and County the said Frederick M. Brooks, being personally well known to me as the person who executed the said Deed, and acknowledged the same to be his act and deed.

13 Given under my hand and seal this 18th day of July A. D. 1931.

(Notarial Seal)

LEONARD A. KIRTON.
Notary Public.
Notary Public, New York County
N. Y. Co. Clk's No. 129, Reg. No. 3-K-110
Term Expires March 30, 1933.

C. C., A.

Office of the Recorder of Deeds
District of Columbia

This Is To Certify that the foregoing is a true and verified copy of an instrument as recorded in Liber 6581, folio 75, et seq., one of the Land Records of the District of Columbia.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of this Office this 18th day of March, A. D. 1938.

(Seal)

WM. J. THOMPCKINS
Recorder of Deeds, D. C.

14

Filed December 31 1937

In the District Court of the United States for the
District of Columbia

Holding An Equity Court

EQUITY NUMBER 63-558

ELIZABETH BROOKS, *Plaintiff,*

vs.

LEON WILLIAMS, ET ALs, *Defendants.*

*Final Decree Setting Aside Deeds and Sale, Referring
Cause to Auditor, Etc.*

Upon consideration of the Amended Petition filed herein, and the several answers filed thereto, and after testimony in open Court in behalf of the plaintiff and the several defendants, and it further appearing that the prayer for affirmative relief contained in the answer of the defendant Justus S. Wardell, as Receiver of the Northeast Savings Bank, having been withdrawn in open Court, it is this 31st day of December, 1937,

ORDERED, ADJUDGED AND DECREED, that the deed from the plaintiff Elizabeth Brooks, Dorothy A. Brooks (Heard), Bruce E. Brooks, Joseph Brooks and Frederick M. Brooks, to the defendant Leon Williams, bearing date on the 21st day of March, 1932, and recorded among the land records of the District of Columbia, on the 24th day of March, 1932, in Liber 6644, Folio 71, conveying certain parcels of land situated in the District of Columbia, and described as parcels 184/32 and 184/33, be and the same is hereby decreed to be null and void and of no effect, and the said deed is hereby removed as a cloud on the plaintiff's title, and it is further,

15 ADJUDGED, ORDERED AND DECREED, that the deed from the plaintiff, and her children, Dorothy A. Brooks (Heard), Bruce E. Brooks, and Frederick W.

Brooks, dated on the 27th day of August, 1936, and recorded among the land records of the District of Columbia, on the 26th day of September, 1936, in Liber 7034, Folio 71, be, and the same is hereby decreed to be null and void and of no effect, and the said deed is hereby removed as a cloud on the plaintiff's title, and it is further,

ADJUDGED, ORDERED AND DECREED, that Charles V. Imlay and Percy H. Russell, trustees under three (3) certain deeds of trust recorded respectively in Liber 7054, Folio 589; Liber 7061, Folio 167; Liber 7061, Folio 171, be and they are hereby, directed to release, forthwith, all three of said deeds of trust in favor of the plaintiff and her children, and it is further,

ADJUDGED, ORDERED AND DECREED, that the foreclosure sale held on the 25th day of January, 1937, be, and the same is hereby, vacated and set aside, but the said Northeast Savings Bank, through its Receiver, Justus S. Wardell, is held entitled to all costs, charges, and expenses actually incurred in making such foreclosure sale, including commission to the trustees, reasonable attorneys' fees the fee of the auctioneer and advertising expenses, said charges, costs and expenses to be borne by the defendant Leon Williams, and to be charged against the Three Hundred (\$300.00) Dollars belonging to Leon Williams, now held by the trustees as a deposit; and the trustees be, and they are hereby, authorized and directed to charge the aforesaid items against the said deposit; any portion of the expenses of said sale remaining unpaid after the deduction as aforesaid shall constitute a part of the indebtedness secured by the lien of the first trust aforesaid, and it is further,

16 ADJUDGED, ORDERED AND DECREED, that the plaintiff shall be entitled to set-off any sum finally paid by her on account of said expenses of the sale aforesaid by virtue of the preceding paragraph, against the sum finally found to be due the defendant Leon Williams by the plaintiff, and it is further,

ADJUDGED, ORDERED AND DECREED, that the first deed of trust, dated the 27th day of June, 1931, to George F. Hoover and James B. Flynn, trustees, given to secure the Northeast Savings Bank, and recorded in Liber 6581, Folio 75, et seq., among the land records of the Dis-

trict of Columbia, be and the same is hereby, held to be a good, valid and subsisting first trust against the property aforesaid, and prior to any and all other liens, and it is further,

ADJUDGED, ORDERED AND DECREED, that the defendant Leon Williams be, and he is hereby, held entitled to recover from the plaintiff, Elizabeth Brooks, only such sums authorized by her and expended by him on the aforesaid property, and also any sums paid on principal and interest and taxes, and also any such sums so spent are hereby held to be a lien against the aforesaid property subject only to the first lien of the aforesaid trust, and it is further,

ADJUDGED, ORDERED AND DECREED, that this cause be, and the same is, hereby referred to the Auditor of this Court to determine the amount to be recovered by the defendant Leon Williams under provisions of the preceding paragraph, the expenses of such reference, together with the costs of these proceedings to be borne by the defendant Leon Williams.

By the Court:

JENNINGS BAILEY
Justice

17 *Return of Justus S. Wardell, as Receiver of the
Northeast Savings Bank, to Rule to Show Cause.*

Filed March 26 1938

* * *

Comes now Justus S. Wardell as Receiver of the Northeast Savings Bank, Washington, D. C., a defendant in the above entitled cause, and for return to the rule to show cause issued March 19, 1938, respectively states as follows:

1. Defendant admits the averments of Paragraph 1 on information and belief except as to plaintiffs' representation of Frederick M. Brooks, Dorothy Brooks Heard and Bruce E. Brooks, as to which defendant has no information and therefore neither admits nor denies said averment.

2. Defendant admits the averments of Paragraph 2 of the bill of complaint.

3. Answering Paragraph 3 of the bill of complaint, defendant admits that plaintiff is the widow of Frederick U.

Brooks, deceased, who died intestate on August 16, 1930, and that he left surviving him, besides said widow, four children, Dorothy A. Brooks, Joseph Brooks, Bruce E. Brooks and Frederick M. Brooks; and defendant further admits that title to property known and described as parcels 184/32 and 184/33 of the land records of the District of Columbia, improved by premises 1247 Kenilworth Avenue, Northeast, was in the name of Elizabeth Brooks as to an undivided one-half interest, and in said Joseph B. Brooks, Frederick M. Brooks, Dorothy A. Brooks and Bruce E. Brooks, as to the remaining one-half interest as tenants in common in said property at the time of execution of the notes and deed of trust; and defendant further says that by a final decree of this Court dated December 31, 1937, entered in Equity Cause No. 63,558, it was adjudged and decreed that a lien in favor of the Northeast Savings Bank resulting from a first deed of trust dated June 27, 1931, and recorded in Liber 6581, Folio 75 of the land records 18 of the District of Columbia, should be a valid and subsisting lien prior to all other liens and charges against said property.

4. Defendant admits the averments of Paragraph 4 of the bill of complaint, but denies that a copy of said deed of trust was attached to the copy of the bill of complaint served upon this defendant.

5. Defendant neither admits nor denies the averments of Paragraph 5 of the bill of complaint, but requires strict proof thereof, and further avers that under the terms of the final decree in Equity 63,558, signed by Justice Bailey on December 31, 1937, this defendant, as Receiver of the Northeast Savings Bank, is entitled to payment in full of all his claims against said property arising out of the execution of the notes and deed of trust, which claims and indebtedness secured by said deed of trust have become, under the terms of said decree, a prior lien and charge against said property ahead of all other liens and charges upon and against said property, and which indebtedness amounts to approximately \$5220.00 in addition to costs of the first sale, trustees' commissions, attorney's fees for counsel for trustees, as to which claim will be made by said trustee defendants.

6. Answering Paragraph 6 of the bill of complaint this defendant for lack of knowledge neither admits nor denies

the averments contained therein, and says that as a result of a fire occurring on said premises 1247 Kenilworth Avenue, Northeast, on or about January 19, 1934, claim was made by the then Receiver of the Northeast Savings Bank against Continental Insurance Company, the insurer on two certain fire insurance policies on said property, being numbers 81836 and D4413 in the amounts of \$1500.00 and \$2000.00 respectively, for the sum of \$725.00, said amount representing estimated repairs to said property
19 necessitated on account of damage by fire; that under the terms of said policies any loss was payable to George F. Hoover and James B. Flynn, Trustees under the first deed of trust securing the Northeast Savings Bank, as their interest might appear; that said Continental Insurance Company insisted upon rights of subrogation under the terms of said policies of insurance, and at the request of the bank the Trustees under date of June 12, 1934, assigned to said Continental Insurance Company an interest in all the securities held by said trustees as security for the mortgage debt to the extent of \$725.00; that thereafter the Continental Insurance Company paid said claim in the amount of \$725.00 to the Receiver of the Northeast Savings Bank, which amount was credited to the principal of the notes secured by said deed of trust, in accordance with the terms of said deed of trust, the notes being overdue and unpaid.

7. Answering Paragraph 7 of the bill of complaint this defendant has no knowledge of the averments therein contained and hence can neither admit nor deny the same.

8. For an answer to Paragraph 8 of the bill of complaint this defendant adopts his answer to Paragraph 6 thereof, but denies that said agreement of the trustees to permit the insurer to share in the mortgage security was in violation of law.

9. Answering Paragraph 9 of the bill of complaint this defendant denies each and every averment therein contained and says that this defendant conferred with his counsel and as a result of such conferences this defendant issued a letter of instructions to George F. Hoover and James B. Flynn as Trustees, under date of March 12, 1938, to the effect, inter alia, that if prior to the time set for the sale of said property, said Trustees received in cash, or were them-

20 selves satisfied that they would receive sufficient funds to cover the costs in connection with the sale already incurred and such additional costs as might be incurred in connection with the readvertising of said property and the postponement of the sale, that consent to the postponement of said sale not to exceed two weeks would be given, a copy of which letter of instructions is attached hereto and made a part hereof; that this defendant ascertained from Adam F. Weschler, auctioneer, having charge of such sale, the approximate amount of costs incurred to date in connection with said sale and the amount of costs to be incurred in connection with said postponement, which amount aggregated \$74.50; that defendant is advised by his counsel that they advised the attorneys for plaintiff that if these costs were paid in cash prior to the time set for the sale, that consent to a postponement of said sale would be given; that defendant is informed and believes, and therefore avers, that as a result of said instructions and said negotiations the sum of \$74.50, represented by a payment of \$54.50, together with the sum of \$20.00 previously deposited with the Trustees, was paid to the Trustees covering the costs incurred and to be incurred in connection with the advertisement and postponement of the sale and that as a result thereof said sale was postponed to and until March 28, 1938 at 4:00 o'clock P. M.

10. Answering Paragraph 10 of the bill of complaint, this defendant admits that at the time of the first sale on or about January 27, 1937 the sum of \$300.00 was paid to the Trustees as a deposit in connection with the auction sale, as to which deposit and the expenditure made therefrom this defendant has no knowledge, and as to which the said Trustees, defendants herein, may advise the Court.

11. Answering Paragraph 11 of the bill of complaint this defendant denies each and every averment therein contained, except that he admits that upon advice of
21 counsel this defendant wrote a letter of instructions to the Trustees (Exhibit A) in which he consented to a postponement of the sale for two weeks from March 14, 1938, provided that said trustees received in cash or were satisfied that they would receive sufficient funds to cover the costs incurred in connection with the sale and such additional costs that might be incurred in connection

with readvertising the property for sale and the postponement thereof; and that defendant is advised and believes, and therefore avers, that his counsel have communicated with plaintiff and her counsel, advising that unless the claim of the defendant as Receiver is extinguished in full by March 28, 1938, the time to which said auction sale has been postponed, no further postponement will be consented to and said sale will be proceeded with in accordance with the readvertisement, all of which is shown by a letter from defendant's counsel to plaintiff's counsel dated March 15, 1938, attached hereto and made a part hereof.

And for a further return to the rule to show cause, this defendant says that as Receiver of the Northeast Savings Bank he is required by law to liquidate the affairs of his trust expeditiously and diligently so that the highest possible amount can be received at the earliest possible date for distribution to creditors of said bank; that in accordance with said duties the real estate notes secured by the deed of trust to the Northeast Savings Bank should be collected and liquidated at the earliest possible date to the end that the proceeds thereof may be distributed to creditors; that the rights of the plaintiff in connection with the various transactions complained of are fully protected by a decree of this Court rendered on December 31, 1937 in Equity Cause No. 63,558, and that the bill of complaint herein states no facts sufficient to justify the relief prayed.

22 And having fully answered this defendant prays that the rule to show cause herein be as to him discharged, and the bill dismissed, with his proper costs.

JUSTUS S. WARDELL

Receiver

Northeast Savings Bank

BRICE CLAGETT

CHARLES E. WAINWRIGHT

Attorneys for Receiver

DISTRICT OF COLUMBIA, ss:

Justus S. Wardell, being first duly sworn, on oath deposes and says that he is the duly appointed, qualified and acting Receiver of the Northeast Savings Bank, and as such Receiver has read the foregoing Return To Rule to Show

Cause, by him subscribed, and knows the contents thereof; that the things therein stated as true are true and those stated on information and belief he believes to be true.

JUSTUS S. WARDELL

Subscribed and sworn to before me this 22 day of March, A. D., 1938.

LLOYD H. JOHNSON

(Seal)

Notary Public, D. C.

23

March 12, 1938

Messrs. George H. Hoover and
James B. Flynn, Trustees under the
Deed of Trust dated June 27, 1931, by and between the
Trustees and Elizabeth Brooks, et al,
Washington Loan & Trust Company Building,
Washington, D. C.

Gentlemen:

With respect to the above described Deed of Trust and referring particularly to the Trustees' sale thereunder advertised for Monday, March 14, 1938, at 4:00 o'clock P. M., this is to advise that I, as Receiver of the Northeast Savings Bank, owner of the notes secured by such Deed of Trust, have today received a communication from Thurmond L. Dodson, attorney for Mrs. Elizabeth Brooks, owner of the property covered by the Deed of Trust, stating that there has been deposited with the District Title Insurance Company of 1413 I Street, Northwest, a check in the amount of \$5,579.00 "for the purpose of settling" the Receiver's claim against such property. This letter also states that the sum mentioned is supposed to cover in full all claims of the Northeast Savings Bank including those which have arisen in connection with the final decree in Equity Cause No. 63-558, and such letter concludes by *by* requesting that I instruct the Trustees to withdraw this property from sale.

Although I have not confirmed by communication with the Title Company Mr. Dodson's letter, I am assuming that it correctly states the facts and hence I hereby request you as Trustees to follow either one of the following alternatives:

1. If prior to the time of the sale on Monday, March 14, you receive, or are yourselves satisfied that you will promptly receive an amount in cash covering the following items, then and in that event so far as the Northeast Savings Bank is concerned you are authorized to deliver to the Title Company if you are shown authority therefor from Mrs. Brooks the notes secured by the Deed of Trust, the Deed of Trust and a Release of such Deed of Trust.

The claim of the Northeast Savings Bank on account of this indebtedness as of the close of business March 14, 1938, is as follows:

Principal amount of note due	\$2900.00
Accrued interest to March 14, 1938	1019.53
Taxes paid to the District of Columbia	1092.14
Counsel fees of counsel for the Northeast Savings Bank under Deed of Trust in connection with liti- gation over its validity	200.00
Court costs, rule to show cause	1.50
Total	\$5213.17

You will, of course, attend also to the collection of the costs including your attorney's fee incurred in connection with the previous Trustee's sale of this property in accordance with the decrees of Court in the above described action.

I assume that you will also collect whatever actual costs you have incurred in connection with the advertising, etc., of the sale now set for Monday, March 14, 1938.

24 In this connection I also remind you of the assignment which I understand was previously delivered by you to one or more insurance companies in 1934, and assume that you have copies of such assignment or assignments since it or they were signed by you as Trustees.

2. In the alternative, if prior to the time set for the sale on Monday, March 14, you receive in cash, or are yourselves satisfied that you will receive sufficient funds to cover the costs in connection with the present sale already incurred by you, and such additional costs as you may have to incur in connection with re-advertising this property for sale, this will authorize you to announce the postponement of the sale for not to exceeding two weeks from March 14. This second alternative is stated for the reason that the

figures in connection with this transaction appear to be rather complicated, and it may not be possible to completely settle such figures prior to the time set for the sale on Monday, March 14, 1938.

Very truly yours,

JUSTUS S. WARDELL,

Receiver

*Northeast Savings Bank of
Washington, D. C.*

W31238

(Copy to be used as attachment)

25

March 15, 1938

Thurman L. Dodson, Esquire,
615 F Street, Northwest,
Washington, D. C.

Dear Mr. Dodson:

Receipt is acknowledged of your letter of March 14, 1938 inclosing copy of letter to Mr. Flynn advising of the tendering to him of the sum of \$54.50 which, together with the sum of \$20.00 previously paid to Mr. Hoover, the co-trustee, constitutes the sum of \$74.50, the estimated cost of the postponement of the sale of 1247 Kennilworth Avenue, Northeast.

We have communicated with the trustees and have ascertained that they have received this amount and they have agreed to postpone the sale until March 28, 1938 at 4:00 o'clock P. M. Mr. Clagett and I are agreeable to this arrangement in order that you might be saved the time, trouble and expense that would be incurred in connection with an injunction proceeding. This is to advise you, however, that unless the obligation due to the Receiver of the Northeast Savings Bank is paid prior to the time set for the sale, and the claim of the said Receiver is extinguished in full, no further postponement will be agreed to and said sale will be proceeded with in accordance with the advertisement.

Very truly yours,

CHARLES E. WAINWRIGHT

CEW:W

CC: Elizabeth Brooks

(Copy to be used as attachment)

W32138

26 *Affidavit in Support of Petition to Remove Trustees*

Filed March 31 1938

DISTRICT OF COLUMBIA, ss:

Thurman L. Dodson, being first duly sworn according to law and upon his oath, deposes and says that he is the attorney for the plaintiff herein and that he has personal knowledge of the facts herein recited; that the trustees, further demonstrating their hostility and lack of disinterestedness, did on to wit the 28th day of March, 1938, at 4:00 P.M., sell the property secured by the trust at public auction, although one of the trustees had been served the rule in this cause a week, and they both filed their answer in this court on the 28th of March, but the plaintiff was not apprised of its filing until the morning of the 29th of March; that under the terms of this rule the matters could have been disposed of Monday morning, or any time prior thereto; that the affiant sought unsuccessfully prior to the date and time of the sale to ascertain the position of the noteholder; that a postponement of the sale until after this Rule could have been heard would not have damaged the trustees, because they were in possession of the entire costs of sale up until that time, whereas the usual practice in case of postponement is a requirement of only the costs incident to a postponement.

THURMAN L. DODSON

Subscribed and sworn to before me this 31st day of March, 1938.

BROOKS T. SANDERS

(Seal)

Notary Public, D. C.

27 *Answer to Rule to Show Cause*

Filed March 28 1938

Come now James B. Flynn, named in the petition filed herein as "James F. Flynn," and George F. Hoover, and for answer to the Rule To Show Cause issued herein, say:

1.

That they are without knowledge as to the residence and citizenship of the plaintiff.

2.

That they admit the allegations of this paragraph.

3.

That on information and belief, they admit the allegations of this paragraph.

4.

That they admit the allegations of this paragraph with the exception of the last part thereof which states that a copy of said deed of trust is attached to the petition, and aver the fact to be that no copy of the said deed of trust is attached to the petition served on them.

5.

That they deny the allegations of this paragraph, and state that they have been advised, believe, and therefore aver that no money whatsoever is on deposit with the District Title Company to the account of the plaintiff, but that an uncertified check in the amount of \$5579.00 has been left with the Title Company for the purpose of securing a new lien on the property involved herein; that from the aforesaid check, the Title Company has been instructed to deduct the sum of \$114.00 for a commission to be paid to one, Jesse Rawlings, \$10.00 for preparation of deeds, and title charges of approximately \$50.00, and that, treating
28 said check as cash, there would only be a net amount of approximately \$5404.00 to be applied on the present first trust, this amount being totally inadequate to discharge the lien of said trust which approximates the amount of \$6471.89, as detailed below:

To Amount due on Note to Receiver for

Northeast Savings Bank	\$2900.00
" Overdue interest to March 28th 1938	1024.92
" Taxes paid to the District of Columbia by the Receiver for the Northeast Savings Bank	1092.14
" Counsel fees to counsel for the Northeast Savings Bank	200.00
" Court costs	1.50

To Amount applied on principal, received from the Continental Insurance Company under two policies of insurance because of fire occurring at said premises for which the said insurance company denied liability to the makers of the note	725.00	
“ Interest on said sum of \$725.00 from October 24th 1934 to March 28th 1938	149.08	
“ Trustees’ commission for 1st sale in accordance with the provisions of deed of trust and Decree of this Court in Equity Cause No. 63558 ..	360.00	
“ Attorneys’ fee to Trustees in accordance with provisions of deed of trust and said Decree of Court	200.00	
“ Advertising in Evening Star in accordance with provisions of deed of trust and said decree of this Court	47.25	
“ Auctioneer’s fee in accordance with provisions of said deed of trust and said decree	72.00	
“ Fee of auctioneer and advertisement for second sale set for March 28th 1938	74.50	
Total		\$6,846.39
LESS \$300.00 received as deposit on first sale, and \$74.50 paid by plaintiff on account of advertising to date under second sale in order to obtain a continuance of the same		374.50
TO BALANCE to discharge lien as aforesaid..		\$6,471.89

That they deny the plaintiff is able to pay the lien secured by said first deed of trust in full, but admit that they claim the amount of \$725.00, plus interest, is due to the aforesaid Continental Insurance Company, and aver that the plaintiff and her attorney have been cognizant of this fact for a

long time past, and aver that in their Answer filed in said Equity Cause No. 63,558 on, to wit, the 7th day of June, 1937, they stated that said policy of insurance was payable to them as Trustees, and that after the fire which occurred at said premises, the said insurance company denied any liability to the plaintiff or to the owner of the legal title, Williams, on the ground, among other things, that the said fire was of an incendiary origin, and refused to pay to the said Trustees any sum whatsoever, unless the Trustees executed to it an assignment of mortgage interest to the extent of the amount paid by said insurance company and, consequently, with the consent of the Receiver for the Northeast Savings Bank and the Comptroller of the Currency, they executed to said insurance company an assignment of said mortgage to the extent of \$725.00 and received from said insurance company the sum of \$725.00, which sum was then and there applied to the principal of plaintiff's notes secured by said mortgage, in accordance with the provisions of said deed of trust. That the said mortgage was then and there overdue and in default; that a copy of said assignment is attached hereto and made a part hereof marked "Exhibit A," and that a copy of said policy of insurance is attached hereto and made a part hereof marked "Exhibit B."

7.

That they deny the allegations of this paragraph, but admit that they have advised the plaintiff that they would not release the said deed of trust unless there was paid all the charges secured by said deed of trust and the Decree in Equity Cause No. 63,558.

30

8.

That they deny that said assignment was made without right or authority on the part of the Trustees and deny that the same was contrary to the terms of the deed of trust as aforesaid, or in violation of Section 522 of the D. C. Code, and aver that they had no discretion in the matter, but under the provisions of said policy of insurance were duty bound to execute said assignment.

9.

That they admit that they refused to postpone the sale of said real estate unless the plaintiff deposited with them the

sum of \$74.50, to guarantee the payment of the expenses incident thereto, and that they deny that the holder of the note had instructed the Trustees to postpone said sale upon a mere verbal or written guarantee, and they deny that their conduct has been, in any way, hostile to the plaintiff but aver the fact to be that they were merely proceeding with the duties of their office as Trustees in accordance with law and the provisions of said deed of trust.

10.

That they admit they have received from the plaintiff the sum of \$74.50, as stated above, and \$300.00 from one, Leon Williams, as aforesaid.

11.

That they deny they have shown hostility toward the plaintiff, but admit that they refused to accept the sum proffered to them to safeguard the Trustees as a condition precedent to a postponement, for that they aver that the sum tendered was \$20.00 and was insufficient to cover the cost of advertising, and they deny that the holder of the note had instructed them that such a guarantee would be acceptable to said noteholder, but aver that the noteholder
31 notified them to postpone the sale upon payment to them of a sum sufficient to cover the advertising and auctioneer's fee and which amounted to \$74.50 as aforesaid, and they deny that they have refused or neglected to negotiate with the fire insurance company for the purpose of "cleaning up the situation for which they are alone responsible" but aver that they were never asked by anybody to do so. They admit they have failed to do so and aver that, as Trustees, they had no right or authority to negotiate with the insurance company for that purpose, but were bound to maintain an impartial attitude in the matter and to comply with law and the provisions of the deed of trust and the insurance policy. They further deny that they have shown any inability to act in a disinterested manner as alleged.

12.

Further answering, these defendants aver that they have no interest in this matter other than their interest as Trustees; that they have attempted to perform their duties as

Trustees in accordance with law. That they were instructed, in writing, by the Receiver for the Northeast Savings Bank on, to wit, the 25th day of February, 1938, to make sale of said premises in accordance with the provisions of the deed of trust; that the plaintiff had defaulted in that she had failed to pay the amount secured by said deed of trust, all of which was then and there long overdue, and had failed to pay the taxes assessed against said property for several years past. That, as a result of said letter from said Receiver, the Trustees, in good faith, advertised said property for sale for four o'clock P. M., on the 14th day of March, 1938, and continued said sale until March 28th, 1938, at the request of said Receiver, as hereinbefore stated.

13.

And further answering, these defendants say that
32 the issue sought to be raised by plaintiff's petition filed herein is "Res Adjudicata," for that in Equity Cause No. 63558 filed in this Court on the first day of February, 1937, wherein the present plaintiff was named as plaintiff, and the present defendants were named as defendants, the plaintiff charged that the present defendants had disqualified themselves from impartially executing the trust in them reposed and that the trustees by their conduct have forfeited all right to act in the capacity of trustees and had no right to sell or attempt to sell the said property; that the said charge was denied and the Court found the same to be untrue, and found that the trustees acted in good faith and were guilty of no wrongdoing.

Now, having fully answered the Rule To Show Cause issued herein, these defendants pray that the said Rule be discharged, the petition dismissed, and that they be allowed their costs and reasonable attorneys fee.

JAMES B FLYNN
GEORGE F HOOVER
Respondents.

S. J. L'HOMMEDIEU
Attorney.

DISTRICT OF COLUMBIA, ss:

We do solemnly swear that we have read the foregoing and annexed Answer by us subscribed and know the contents thereof; that the matters and things therein stated as upon personal knowledge are true, and those stated as upon information and belief, we believe to be true.

JAMES B FLYNN
GEORGE F HOOVER
Respondents.

Subscribed and sworn to before me this 25th day of March, 1938.

VINCENT A SHEEHY, JR.

(Seal)

Notary Public, D. C.

33

Exhibit A.

Assignment of Mortgage Interest

Whereas, The Continental Insurance Company did, on or about January 24, 1931 issue its Policy No. D 4413 in favor of Frederick U. Brooks, the same covering upon Dwelling situate 1247 Kenilworth Ave., Northeast, Washington, D. C. whereby the Continental Insurance Company agreed to pay upon said policy loss as should occur, not exceeding the sum of Two Thousand and 00/100 (\$2000.00) Dollars, named in this policy, and

Whereas, the said policy contained a clause making loss, if any, payable to George F. Hoover & James B. Flynn, Trustees, mortgagee, and

Whereas, it appears that the said Norman R. Hamilton, Rec. of Northeast Sav. Bank holds a Mortgage made by Dorothy A., Elizabeth, Joseph, Bruce E., and Frederick U. Brooks in favor of Northeast Savings Bank upon said premises for the sum of Forty-one hundred dollars (\$4,100.00) Dollars, principal, together with interest, which now amounts to Four hundred thirty & 50/100 (\$430.50) Dollars. Said Mortgage is dated June 27th, 1931, and recorded July 30th, 1931, in Book of Recorder of Deeds Liber 6581, Folio 75 in the Office of Recorder of Deeds, Washington, D. C.

Whereas, a fire occurred by which the amount to be paid by The Continental Insurance Company to the said George F. Hoover & James B. Flynn, Trustees pursuant to this agreement, is Four Hundred eighty three and 33/100 (\$483.33) Dollars.

Whereas, the said Continental Insurance Company claims that as to the mortgagor or owner no liability exists.

Now, Therefore, for and in consideration of the payment of Four Hundred eighty-three and 33/100 (\$483.33) Dollars to the said George F. Hoover and James B. Flynn, Trustees, they do hereby sell, assign, and transfer to the
34 said The Continental Insurance Company an interest in all of the securities held by the said George F. Hoover and James B. Flynn, Trustees as collateral for the said mortgage debt to the extent of Four Hundred eighty three and 33/100 (\$483.33) Dollars.

But it is understood that this assignment or subrogation shall not impair the right of the said George F. Hoover & James B. Flynn, Trustees, Mortgagee, in (his, her) their remaining interest in said Mortgage. It being understood that the sum herein assigned is subordinate to balance of mortgage indebtedness owed Northeast Savings Bank in liquidation.

In Witness Whereof, the said Trustees have hereunto set their hands and seals this 12th day of June, 1934.

(Signed) JAMES B. FLYNN (Seal)
GEORGE F. HOOVER (Seal)
Trustees.

Subscribed and sworn to before me this 17th day of July, 1934.

LLOYD H. JOHNSON
(Notarial Seal) Notary Public, D. C.

35 *Assignment of Mortgage Interest*

Whereas, The Continental Insurance Company did, on or about January 21, 1933 issue its Policy No. 81836 in favor of Frederick U. Brooks later transferred to Leon Williams the same covering upon Dwelling and Stable situate 1247 Kenilworth Ave. Northeast, Washington, D. C. whereby the Continental Insurance Company agreed to pay upon said policy loss as should occur, not exceeding the sum of One Thousand Five Hundred and no/100 (\$1500.00) Dollars, named in this policy, and

Whereas, the said policy contained a clause making loss, if any, payable to George F. Hoover and James B. Flynn, Trustees mortgagee, and

Whereas, it appears that the said Norman H. Hamilton, Receiver of Northeast Sav. Bk. holds a mortgage made by Dorothy A., Elizabeth, Joseph, Bruce E., and Frederick U. Brooks in favor of Northeast Savings Bank upon said premises for the sum of Forty-one hundred dollars (\$4,100.00) Dollars, principal, together with interest, which now amounts to Four hundred thirty & 50/100 (\$430.50) Dollars.

Said Mortgage is dated June 27th, 1931, and recorded July 30th, 1931 in Book of (Mortgages) Recorder of Deeds Liber 6581, Folio 75 in the Office of Recorder of Deeds, Washington, D. C.

Whereas, a fire occurred by which the amount to be paid by The Continental Insurance Company to the said George F. Hoover and James B. Flynn, Trustees pursuant to this agreement, is Two Hundred forty one and 67/100 (\$241.67) Dollars,

Whereas, the said Continental Insurance Company claims that as to the mortgagor or owner no liability exists,

Now Therefore, for and in consideration of the payment of Two hundred forty-one and 67/100 (\$241.67) Dollars to the said George F. Hoover and James B. Flynn, Trustees, they) do hereby sell, assign and transfer to the said The Continental Insurance Company an interest in all of the securities held by the said George F. Hoover and James B. Flynn, Trustees, as collateral for the said mortgage debt to the extent of Two hundred forty-one and 67/100 (\$241.67) Dollars.

But it is understood that this assignment or subrogation shall not impair the right of the said George F. Hoover and James B. Flynn, Trustees, in their remaining interest in said mortgage. It being understood that the sum herein assigned subordinate to balance of mortgage indebtedness owed Northeast Savings Bank in liquidation.

In Witness Whereof, the said Trustees have hereunto set their hands and seals this 12th day of June, 1934.

(Signed) JAMES B. FLYNN (Seal)
GEORGE F. HOOVER (Seal)
Trustees.

Subscribed and sworn to before me this 17th day of July, 1934.

LLOYD H. JOHNSON
Notary Public, D. C.

Fidelity-Phoenix
EXHIBIT B THE CONTINENTAL
Fire Insurance Company
of New York

Amount \$ 1,502.00 Rate 1st Item - 25x2 1/2 2nd Item - 3rd Item - 4th Item - 5th Item - Auto Charge - Premium \$ 9.38

In Consideration of the Stipulations herein named and of
 Nine and 38/100

Does Insure **Frederick U. Brooks** Dollars Premium
 and legal representatives for the term of **Three years**
 from the **24th** day of **January** **1931** at noon
 to the **24th** day of **January** **1934** at noon

Against all direct loss or damage by Fire, except as hereinafter provided,
 to an amount not exceeding **Fifteen hundred and NO/100** Dollars,
 to the following described property while located and contained as described herein, and not elsewhere, to wit:

- 1 \$ 1,500.00 On DWELLING HOUSE, consisting of a two story frame Building with
 Washington, D. C. ^{Roof situated No.} 1247 Kenilworth Avenue, Northeast,
 occupied and to be occupied only for dwelling purposes by not exceeding three families.
- 2 \$ Nil On HOUSEHOLD AND PERSONAL EFFECTS as hereinafter described, all only while contained in the above
 described dwelling.
- 3 \$ Nil On the RENTAL VALUE of the above described dwelling house.
- 4 \$ Nil On additions and extensions thereto, and all permanent fixtures therein, thereon and belonging thereto, while
 occupied as a private building, and situated on the above described premises.
- 5 \$ Nil On and situated on the above described premises.

\$1,500.00 Total Insurance. Applying as Scheduled, none of the foregoing numbered items or parcels of property being
 insured by this policy unless a specified amount is set opposite the same, the sum of which itemized amounts shall equal the total
 insurance.

The respective kinds of property in the foregoing schedule being more particularly described in the following pages hereof.

The provisions printed on the inside pages of this policy relating to Rental Value are hereby referred to and made a part hereof
 when a certain amount is specified and inserted in blank immediately preceding Item No. 3.

UNOCCUPANCY AND VACANCY.—It is understood and agreed that the vacancy or nonoccupancy of the above mentioned premises,
 whether in whole or in part, shall not invalidate this insurance.

AUTOMOBILE PERMIT "A"—(Permit to keep automobiles is void unless number of machines and location is given.)—In consideration
 of \$ additional premium and subject to the conditions on inside page of this policy permission is granted,
 when not in violation of any law, statute or municipal restriction, to keep not more than automobiles using gasoline,
 in the building described under Item No. of this policy.

OIL BURNING EQUIPMENT PERMIT.—(Automatic Control System.) (This privilege is void unless name and type of equipment
 is given.)

Permission is hereby granted, when not in violation of any law, statute or municipal restriction, to use a system
 for heating or cooking, manufactured by

Additional Premium required if Installation is not approved by the Underwriters' Association of the District of Columbia.

of using oil or fuel.

LOSS, IF ANY, ON BUILDINGS payable to **George M. Hoover and James B. Flynn, First Trust,**

Mortgagee (or trustee) as interest may appear, subject to conditions of mortgage clause herein.

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulation and conditions
 printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agree-
 ments or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall
 have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement
 endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent or representative shall have such power or
 be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor
 shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

IN WITNESS WHEREOF, the said Company has caused this policy to be signed by its President and attested by its Secretary. This
 policy shall not be valid until countersigned by the duly authorized Agent of the Company at **WASHINGTON, D. C.**

Countersigned at the Agency of this Company at **Washington, D. C.**
 this **2nd** day of **January** **1931.**

**ADDITIONAL PERMITS AND
 CONDITIONS ON FOLLOWING PAGES**

(Signed) **Thos. D. Walsh** Agent.

STIPULATIONS, CONDITIONS AND PERMITS FORMING A PART OF THIS POLICY.

This policy shall be liable to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair and without compensation for loss resulting from interruption of business or manufacture for the term herein stated, against all direct loss and damage by fire and by removal from premises endangered by fire except as herein provided, to an amount not exceeding the sum herein named to the within described property while located and contained as described herein, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere.

- 1 Fraud, misrepresentation, etc. This entire policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.
- 7 Uninsurable and Excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless specifically named hereon in writing, bullion, manuscripts, mechanical drawings, dies or patterns.
- 12 Hazards not covered. This Company shall not be liable for loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises.
- 20 This entire policy shall be void, unless otherwise provided by agreement in writing added hereto.
- 23 Ownership, etc. (a) If the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed; or (d) if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy be assigned before a loss. Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage occurring.
- 35 Other insurance. (a) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or
- 39 Increase of hazard. (b) while the hazard is increased by any means within the control or knowledge of the insured; or
- 41 Repairs, etc. (c) while mechanics are employed in building, altering or repairing the described premises beyond a period of fifteen days; or
- 44 Explosives, gas, etc. (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises fireworks, Greek fire, phosphorus, explosives, benzene, gasoline, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; or
- 53 Factories. (e) if the subject of insurance be a manufacturing establishment while operated in whole or in part between the hours of ten P. M. and five A. M., or while it ceases to be operated beyond a period of ten days; or
- 56 Unoccupancy. (f) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days; or
- 59 Explosion, Lightning. (g) by explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only.
- 63 Chattel mortgage. Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage to any property insured hereunder while incumbered by a chattel mortgage, and during the time of such incumbrance this Company shall be liable only for loss or damage to any other property insured hereunder.
- 69 Fall of building. If a building, or any material part thereof, fall except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.
- 73 Added Clauses. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss or damage, and any other agreement not inconsistent with or a waiver of any of the conditions or provisions of this policy, may be provided for by agreement in writing added hereto.
- 78 Waiver. No one shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement added hereto, nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added hereto, nor shall any provision or condition of this policy or any forfeiture be held to be waived by any requirement, act or proceeding on the part of this Company relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto.
- 89 Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by the Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.
- 101 Pro rata liability. This Company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not and whether collectible or not.
- 106 Noon. The word "noon" herein means noon of standard time at the place of loss or damage.
- 108 Mortgage interests. If loss or damage is made payable, in whole or in part, to a mortgagee not named herein as the insured, this policy may be cancelled as to such interest by giving to such mortgagee a ten days' written notice of cancellation. Upon failure of the insured to render proof of loss such mortgagee shall, as if named as insured hereunder, but within sixty days after notice of such failure, render proof of loss and shall be subject to the provisions hereof as to appraisal and times of payment and of bringing suit. On payment to such mortgagee of any sum for loss or damage hereunder, if this Company shall claim that as to the mortgagee or owner, no liability existed, it shall, to the extent of such payment be subrogated to the mortgagee's right of recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue; or it may pay the mortgage debt and require an assignment thereof and of the mortgage.
- 124 Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.
- 126 Requirements in case of loss. The insured shall give immediate notice, in writing, to this Company, of any loss or damage, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and, the insured shall, within sixty days after the fire, unless such time is extended in writing by this Company, render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss or damage thereto, all incumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish a copy of all the descriptions and schedules in all policies and if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.
- 139 Appraisal. In case the insured and this Company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property insured is located. The appraisers shall then appraise the loss and damage stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.
- 176 Company's options. It shall be optional with this company to take all, or any part, of the articles at the agreed or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required; but there can be no abandonment to this Company of any property.
- 183 Abandonment. The amount of loss or damage for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss or damage is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.
- 193 Suit. No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, nor unless commenced within twelve months next after the fire.
- 197 Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this Company.

In Witness Whereof, This Company has executed and attested these presents; but the same shall not be valid until countersigned by the duly authorized agent of this Company at the Agency here before mentioned.

Attest:

John G. O'Connell
Secretary

37

Paul H. Haid
President

DESCRIPTIONS, DEFINITIONS, LIMITATIONS AND PERMITS

The terms "DWELLING HOUSE," "PRIVATE BARN" AND/OR "GARAGE" shall mean the building, additions and extensions, including foundations, plumbing, electric wiring and stationary heating, lighting and ventilating apparatus and fixtures therein; awnings, door and window screens, and storm doors and windows; also all permanent fixtures belonging to and constituting a part of said building occupied, and to be occupied only for the respective purpose named.

Personal property, if any, of the following kinds, belonging exclusively to the insured hereunder, as building landlord and not as tenant, and in actual use solely for the furnishings of said buildings, viz: floor coverings of public halls and stairs, window shades, and screens belonging therein, fuel contained and intended for use therein, employees' uniforms, and janitor's supplies, is covered hereunder.

This insurance shall also cover under this item, if the property of owner of building, awnings, door and window screens and storm doors, and windows, belonging to within described building, wherever they may be on the within described premises.

The term "HOUSEHOLD AND PERSONAL EFFECTS" shall mean household and personal effects of every description (printed books, musical instruments, radio equipment, pictures, paintings, engravings, including their frames, and statuary and sculpture to be valued at not exceeding cost) belonging to insured and all members of the insured's family, usual or incidental to the occupancy of the premises by the insured as a dwelling, excluding bills of exchange, accounts, bills, currency, deeds, evidences of debt, money, notes or securities; all while contained in the building described as Item No. 1.

It is understood that carpets, rugs, oilcloth, bedding, linen and wearing apparel are covered also while being cleaned, aired or dried out-of-doors on same premises.

This insurance shall also include the interest or liability under contract of the insured in articles, covered under this item, purchased on the installment plan.

The term "RENTAL VALUE" wherever used in this contract, shall mean the determined rental, less such charges and expenses as do not necessarily continue.

It is hereby provided that, if said premises or any part thereof, whether rented at the time or not, shall be rendered untenable by fire or lightning occurring during the continuance of this policy, this Company shall thereupon become liable for the rental value of such untenable portions. Loss to be computed from the date of fire or damage by lightning, until such time as the building could, with reasonable diligence and dispatch, be rendered again tenable, although the period may extend beyond the termination of this policy.

If the insured occupies any portion of said building, a fair rental value of the portion so occupied shall be considered as a part of the rental value insured.

In the event of a disagreement as to the time required to restore the premises to the same tenable condition as before the fire or damage by lightning, or as to the rental value of premises occupied by the insured, the same shall be determined by appraisal or reference in the manner provided in the printed conditions of this policy.

In consideration of the reduced rate at which this Insurance is written, it is agreed that this Company shall not be liable, under this policy, for a greater proportion of any rental value loss that may occur than the sum hereby insured under Item 3 bears to the rental value of the whole of said premises per annum. Total liability under this policy for any loss shall not exceed the sum insured by Item 3 of this policy nor this Company's pro rata proportion of all insurance on rental value, whether other insurance covers against loss caused by lightning or not.

HEATING, LIGHTING AND POWER. Privilege granted to use steam, coal stoves, hot air furnaces or grates for heating; to use kerosene oil, public or municipal gas for light, heating or cooking purposes, and to use electricity for light, heat or power.

GASOLINE. Privilege to use not exceeding one gallon of gasoline, naphtha or benzine for domestic purposes in each housekeeping apartment.

MECHANICS' PRIVILEGE. Permission is hereby given to make alterations, additions or repairs, and this policy (so far as it applies on buildings) shall also cover, in accordance with the conditions of this policy, all materials and supplies thereof, therein or adjacent, and such alterations or additions, and (so far as it applies on contents) shall extend to cover such additions.

OTHER INSURANCE permitted without notice until required.

RADIO PERMIT. Permission is hereby given for the installation and use of radio receiving apparatus.

LIGHTNING CLAUSE AND ELECTRICAL APPARATUS CLAUSE

(Excluding Damage to Dynamos and Other Electrical Apparatus)

This policy also covers direct loss or damage to the property insured by lightning (meaning thereby the commonly accepted use of the term "lightning", and in no case to include loss or damage by cyclone, tornado or windstorm) whether fire ensues or not; it being made a condition of this contract any loss or damage to dynamos, exciters, lamps, switches, motors or other electrical appliances or devices, such as may be caused by lightning or other electrical currents, artificial or natural, is expressly excluded, unless fire ensues, and then this Company is liable only for such loss or damage to them as may be caused by such ensuing fire. It is also a condition of this contract that if there is other insurance upon the property damaged this Company shall be liable only for such proportion of any direct loss or damage by lightning (except as above stated) as the amount hereby insured bears to the whole amount insured thereon whether such other insurance contains a similar clause or not.

MORTGAGEE CLAUSE. Loss or damage, if any, under this policy, shall be payable to the aforesaid as mortgagee (or trustee), as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than those permitted by this policy; Provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right, on like notice, to cancel this agreement.

Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefore existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to cover the full amount of (his, her or their) claim.

AUTOMOBILE PERMIT—"A."

Without Extra Supply of Gasoline in the Building.

Warranties:

First—That no claim shall be made for loss or damage to an automobile, or any of its parts, unless such automobile is specifically mentioned as insured under this policy.

Second—That the opening, filling or emptying of any gasoline reservoir of any automobile while the same is contained in the within described building, shall be done by daylight or incandescent electric light only, and there shall be no other artificial light, and no fire or blaze in the room when such reservoir is open, or in any room adjoining with open communication.

Third—That there shall be no gasoline kept or used inside of such building, its additions or connections, except that contained in the reservoir of any automobile or pump and in cans or other containers only during the act of filling the reservoir.

Fourth—That the supply tank shall be at least five feet from such building, its additions or connections, unless it is buried at least two feet below the level of the basement floor. All pipes for filling or ventilating the supply tank shall be outside of the building, and piping to pump shall be so laid as to pitch to the supply tank without sags.

Fifth—That when acetylene gas is used for automobile lamps it shall be contained in an air-tight metal tank or generator, and unless otherwise permitted not over 25 pounds of calcium carbide shall be kept in the within described building, its additions or connections; such carbide shall be contained in water-tight metal receptacles.

The term "gasoline" shall be held to include naphtha, benzine or any of the light products of petroleum, by whatever name known, and the term "automobile" shall be held to include motorcycle or any other self-propelled vehicle using gasoline.

This permit gives no additional privilege for the use or storage of gasoline, except as may be provided under specific additional permits for the use, sale, storage or the operation of any gasoline device.

Privilege is also granted under this permit to store, for not over 3 days at any one time, the above-mentioned number of automobiles belonging to guests in addition to the automobiles for which this permit is granted.

The permission hereby granted is operative only when not in violation of any law, statute or municipal restriction.

OFFICERS

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Paul L. Hard, President

J. R. Wilson
William Quaid
Herbert E. Maxson
C. W. Pierce
Wm. F. Doolary

Lamar Hill, Vice-President and Counsel

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John W. Clark
Wm. E. Lane, Jr.
V. L. Gallagher
Vernon Hall
J. F. Donica
John C. Derry
Frank A. Christensen
Geo. F. Hayden

Secretaries

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G. A. Boyd
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JOHN J. RICE

ERNEST STROM
JOHN J. WATSON
ALBERT H. WOODRIF
WILLIS D. WOOD

Standard Fire Insurance Policy—District of Columbia
DWELLING HOUSE FORM

Expires January 24, 1934

Property DWG. 1247 Kenilworth
N. E.

Amount \$1,600.00
2,000.00

Premium \$9.38

Frederick U. Brooks

No. D 4413



Fidelity-Phoenix
Fire Insurance Company
EIGHTY MAIDEN LANE, NEW YORK, N. Y.

CASH CAPITAL \$10,000,000

THOMAS D. WALSH, AGENT

815-11 St., N. W. Washington,
D. C.

It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once.

CANCELLATION OF POLICY

19

Received of

DOLLARS,

as return premium on the within Policy which is hereby cancelled and surrendered to the Company.

ASSURED.

TO BE FILLED OUT IN ALL CASES

NO. POLICY		RENEWAL	
Date of Cancellation	Year	Month	Day
" " Policy . . .			
Time in force . . .			
Premium Paid . . . \$			
" Earned . . . \$			
" Returned Assured - \$			
Why Cancelled.			

Assignment of Interest by Insured

The interest of _____ as owner of property covered by this Policy is hereby assigned to _____ subject to the consent of the **FIDELITY-PHENIX FIRE INSURANCE COMPANY**.

Dated _____ 19

(Signature of Insured)

NOTE.—To secure Mortgages, if desired, the Policy should be made payable on its face to such Mortgagee, as follows: Loss, if any, payable to John Doe, Mortgagee.

Consent by Company to Assignment of Interest

The **FIDELITY-PHENIX FIRE INSURANCE COMPANY** hereby consents that the interest of _____ as owner of the property covered by this Policy be assigned to _____

Dated _____ 19

(Signature for Company)

null, void and of no effect as a lien under the aforesaid deed of trust, and it is further

ORDERED, ADJUDGED AND DECREED, that the costs of these proceedings be taxed against the defendants, James B. Flynn and George F. Hoover.

By the Court:

PEYTON GORDON

Justice

From the foregoing Decree the said James B. Flynn and George F. Hoover, in open court note an appeal and the court fixes bond in the sum of One Thousand Dollars to act as a supersedeas and a cost bond in the sum of One Hundred Dollars or Fifty Dollars cash.

PEYTON GORDON

Memorandum

MAY 23-1938.

Bond (\$1000) approved and filed.

42

Assignment of Errors

Filed May 27 1938

* * *

Now come James B. Flynn and George F. Hoover, the above-named defendants and make the following their Assignment of Errors in the above entitled cause.

1.

The Court erred in granting the order, or decree of May 4th 1938, removing trustees and substituting others in their place and stead.

2.

The Court erred in directing them to turn over to the substituted trustees the sum of \$74.50.

3.

The Court erred in ruling that the assignments of mortgage interest entered into between the said James B. Flynn

and George F. Hoover, as trustees, and the Continental Insurance Company, were null and void and of no effect.

4.

The Court erred in ruling that the matters sought to be raised in this case were not *res adjudicata*.

5.

The Court erred in removing them as trustee.

6.

The Court erred in taxing costs against them.

7.

The Court erred in other respects apparent of record.

S. J. L'HOMMEDIEU

*Attorney for Defendants, James
B. Flynn and George F. Hoover,
Trustees.*

43 Service of a copy of the above Assignment of Errors acknowledged this 26th day of May, 1938.

THURMAN L DODSON

HORACE O POLLARD

Attorneys for Plaintiff

Appellants' Designation of Record.

Filed May 27 1938

*

*

*

The Clerk of the Court will please include in the record on appeal the following:

1. Petition to remove trustees and substitute others in their place and stead and exhibits.

2. Decree in Equity Cause No. 63558, entitled, Elizabeth Brooks vs. Leon Williams et al.

3. Answer of James B. Flynn and George F. Hoover to Rule to Show Cause and exhibits.

4. Return of Justus S. Wardell, as Receiver of the Northeast Savings Bank and exhibits.

5. Decree removing trustees and substituting others in their place and stead.

6. Memorandum noting appeal in open Court and fixing bond.
7. Memorandum of filing of supersedeas bond.
8. Assignment of Errors.
9. This designation of record.

S J L'HOMMEDIEU

*Attorney for Defendants,
James B. Flynn and George
F. Hoover*

44 Service of a copy of the above designation of record is hereby acknowledged this 27th day of May, 1938.

THURMAN L. DODSON

HORACE O. POLLARD

Attorneys for Plaintiff

By E. L. WEST

Appellee's Designation of Record

Filed June 2 1938

The clerk will please prepare for the record on appeal in this cause, in addition to the items mentioned in the defendants' designation, the following:

1. Affidavit of Thurman L. Dodson in support of plaintiff's petition.
2. This designation.

HORACE O. POLLARD

THURMAN L. DODSON

Attorneys for Plaintiff

45 District Court of the United States for the
District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 44, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 66770 in Equity, wherein Elizabeth Brooks is Plaintiff and James B. Flynn, Trustee, et al., are Defendants, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 29th day of July, 1938.

C. E. STEWART,
Clerk.

(Seal)

Endorsed on cover: No. 7216. James B. Flynn, Trustee, et al., Appellants, vs. Elizabeth Brooks. United States Court of Appeals for the District of Columbia Filed Aug 1-1938 Joseph W. Stewart, Clerk.

FILED OCT 13 1938

Joseph W. Stewart
CLERK

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1938.

No. 7216.

JAMES B. FLYNN, TRUSTEE, AND GEORGE F. HOOVER,
TRUSTEE, *Appellants*,

v.

ELIZABETH BROOKS, *Appellee*.

Appeal From the District Court of the United States
for the District of Columbia.

BRIEF FOR APPELLANTS.

S. J. L'HOMMEDIEU,
Attorney for Appellants.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1938.

No. 7216.

JAMES B. FLYNN, TRUSTEE, AND GEORGE F. HOOVER,
TRUSTEE, *Appellants*,

v.

ELIZABETH BROOKS, *Appellee*.

Appeal From the District Court of the United States
for the District of Columbia.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This suit was filed by the appellee against Justice S. Wardell, Receiver of the Northeast Savings Bank, and appellants James B. Flynn and George F. Hoover, Trustees under a certain Deed of Trust (R. 2) seek-

ing the removal of the appellants as trustees (R. 4) and the cancellation of a certain assignment made by said trustees (R. 5). The appellee was the owner of certain real estate situated in the District of Columbia (R. 2) and, on the 24th day of June, 1931, she borrowed from the Northeast Savings Bank, now in receivership, the sum of \$4100.00, and secured the same by a first deed of trust against said real estate. The appellants James B. Flynn and George F. Hoover were named in said Deed of Trust as trustees (R. 2). That under the terms of said Deed of Trust, it was provided that the appellee, during all the time that the debt remained unpaid, should keep said improvements insured against loss by fire in the full sum of \$4100.00, in the name and to the satisfaction of the appellants in such fire insurance company or companies as the said appellants might select (R. 9 and 10). That in compliance therewith, the appellee insured said premises under two certain fire insurance policies numbered D4413 and 81836 in the Continental Insurance Company, aggregating the amount of \$4100.00 (R. 28, 29, and 31). That thereafter, during the month of January, 1934, a fire occurred in said premises and on, to wit, the 19th day of January, 1934, the Receiver for said bank made claim against the said Continental Insurance Company for the sum of \$725.00, which was the estimated damages caused by said fire; that, under the terms of said insurance policies, the loss was payable to appellants as trustees (R. 16). That the insurance company denied liability to the owner and refused to pay the claim unless the appellants executed an assignment of mortgage interest to the extent of \$725.00 (R. 16, 28, and 29). That the appellants, with the consent of the Receiver for the bank and the Comptroller

of the Currency, executed said assignments to said insurance company and received from them the sum of \$725.00 (R. 25) which was applied upon the appellee's debt, in accordance with the provisions of said Deed of Trust (R. 10, 16, and 25). That at the time of said fire, the indebtedness secured by the Deed of Trust was overdue and unpaid (R. 16) and has remained overdue and unpaid since said fire. That because of default by the appellee in the payment of the trust, the Receiver for said bank on, to wit, the 25th day of February, 1938, instructed the appellants, in writing, to make sale of the aforesaid premises in accordance with the terms of said trust (R. 27). At this time, the appellee was hopelessly in default, and had not paid the taxes for several years (R. 27), the amount of which was \$1092.14 (R. 23), and interest to March 28, 1938, the date of sale, which amounted to \$1024.92, which was owed to the bank (R. 23) and interest of \$149.08 owed to the Continental Insurance Company (R. 27) plus the entire principal (R. 27). The property was duly advertised for sale which was set for March 14, 1938, and postponed by the Trustees for a period of two weeks, at the request of appellee (R. 21) and the Receiver (R. 27). Thereafter on, to wit, the 19th day of March, 1938, appellee filed this suit (R. 1). The Continental Insurance Company whose assignment the Court was asked to cancel was not made a party (R. 1). A rule was issued by the court on the same day against the Receiver and the appellants to show cause in ten days why the prayers of the petition should not be granted. The Receiver filed his answer on, to wit, the 26th day of March, 1938, and the appellants on, to wit, the 28th day of March, 1938 (R. 22), although only one of the appellants had then been

served (R. 22). The appellee, in her petition, claimed that the trustees were hostile to her (R. 4 and 22) and that they did not have authority to make the aforesaid assignment (R. 3) and that she had sufficient cash deposited with the District Title Company to settle in full all claims of the Receiver (R. 2). The appellants, in their answer, denied that they were hostile (R. 26), and attached to their answer copies of said assignment and insurance policies, all of which was made a part thereof (R. 25, 28, 29, and 31), and which showed their authority to make the assignments complained of, and the appellants averred that there was no cash to appellee's credit at the District Title Company, but rather an uncertified check was left with said title company for the purpose of securing a new first trust, and that, treating said check as cash, the net amount of which would amount to \$5404.00, it was totally insufficient to extinguish the debt secured by said Deed of Trust which, at that time, amounted to \$6,471.89 (R. 24). That on, to wit the 31st day of March, 1938, appellee's attorney filed an affidavit herein, in which he charged that the trustees, "further demonstrating their hostility and lack of disinterestedness, did on to wit the 28th day of March, 1938, at 4:00 P. M., sell the property secured by the trust at public auction, although one of the trustees had been served the rule in this cause a week—" (R. 22). Thus was the record, and the Court, without taking any testimony whatsoever (R. 35) did on, to wit, the 4th day of May, 1938, pass a final decree removing appellants as trustees, ordering them to turn over to the substituted trustees the sum of \$74.50, and cancelling the assignment to the Continental Insurance Company, and taxing the costs against them (R. 35 and 36).

ASSIGNMENT OF ERRORS.

1.

The Court erred in granting the order, or decree of May 4, 1938, removing trustees and substituting others in their place and stead.

2.

The Court erred in directing them to turn over to the substituted trustees the sum of \$74.50.

3.

The Court erred in ruling that the assignments of mortgage interest entered into between the said James B. Flynn and George F. Hoover, as trustees, and the Continental Insurance Company, were null and void and of no effect.

4.

The Court erred in ruling that the matters sought to be raised in this case were not res adjudicata.

5.

The Court erred in removing them as trustees.

6.

The Court erred in taxing costs against them.

7.

The Court erred in other respects apparent of record.

ARGUMENT.**Hostility.**

As the Court below filed no finding of facts, nor any written opinion, it is difficult to see the reasons for the Court's decree. However, as no evidence was taken (R. 35), the decree must either stand or fall on the record. The appellee says that the appellants have been hostile to her. There are no facts in the record to justify this conclusion. Furthermore, the courts have held that trustees under a deed of trust should not be removed even if they are hostile to the *cestui que trust*. In the case of *McPherson v. Cox*, 96 U. S. 454; 24 L. Ed. 746, 751; the Court said, in reversing a decree of the Supreme Court of the District which removed trustees under a deed of trust, as follows:

“As to the removal of McPherson from the trusteeship we think there is no ground for such action.

It may be conceded that where a trustee is charged with an active trust, which gives him some discretionary power over the rights of the *cestui que trust*, and which brings him into constant personal intercourse with the latter, that the mere existence of strong mutual ill feeling between the parties will, under some circumstances, justify a change by the court. But there is here no such case. Mr. McPherson will have and can have nothing to do as trustee which requires any personal intercourse with Mrs. Cox. Unless Ford wishes to pay part of the money and ask a release of part of the property, he has literally nothing to do as trustee until the bond is due. And in all that he may have to do as *trustee*, his duty is so merely ministerial and so clearly defined, that he can do her no harm whatever. When, in addition to this, it is considered that there is another trus-

tee, with equal power and without whom McPherson can do nothing, we see no danger to her interests or any reason for his removal."

And in the case of *Wylie v. Bushnell*, 277 Ill., 484, 505, the Court in a thorough discussion of the rights and duties of trustees, said:

"Counsel for defendants in error insist that the decree of the court was justified because of ill feeling existing between plaintiff in error and some of the defendants in error. 'Mere disagreements between the trustee and *cestui que trust* will not justify a removal, nor the fact that the trustee forbids social intercourse between his family and the beneficiaries (authorities).' The power to remove a trustee appointed by deed or will ought to be exercised sparingly by the courts. There must be a clear necessity for interference to save the trust property. Mere error, or even breach of trust may not be sufficient. There must be such misconduct as to show want of capacity or of fidelity putting the trust in jeopardy (Authorities). This court has held that it will not remove a trustee appointed by the testator himself even though the court might in the first instance not have appointed that person. (*Lorenz v. Miller*, 267 Ill. 230) The care and prudence to be exercised by trustees is that which ordinary men would exercise under like circumstances in connection with their own affairs. If a trustee 'has exercised the care and judgment of ordinarily prudent men in their own affairs, he will not be chargeable for mere errors of judgment nor accidental injuries and losses.' (2 Pomeroy Eq. Jur.—3rd Ed.—Sec. 1070.) It is not every mistake or neglect or inaccuracy in the conduct of trustees which will induce courts of equity to remove them. 'The acts or omissions must be such as to endanger the trust property or to show a

want of honesty or a want of proper capacity to execute the duties or a want of reasonable fidelity.' 2 Story's Eq. Jur.—13th Ed.—Sec. 1289. This doctrine from both authorities last cited was quoted with approval by this court in *Waterman v. Alden*, 144 Ill., 90, the court saying in that case that what the court sought in every case was what was the best interests of the estate and all parties interested therein. The principle underlying the decisions as to the removal of trustees is, that it is only done for acts or circumstances endangering the trust fund. (Authorities.) Generally speaking, it is only in case of a real or threatened diversion of the trust funds or property, or of mismanagement, incompetence or dishonesty that a court may interfere to remove the regularly appointed trustee (Authorities)."

And in the case of *Anderson v. Kemper*, et al., 116 Ky. 339-349, 76 S. W. 122, the Court said:

"Appellant complains of the treatment received at the hands of his trustees and charges that their relations are so strained that it is improper that they should be continued * * *. It does not matter so much what was the state of feelings between the parties, so long as it did not interfere with a just and proper discharge of the fiduciary duties."

The case of *Shea v. Dulin*, 3 McArthur D. C., 340, the facts of which are somewhat similar to the case at bar, was heard on Bill and Answer as the instant case, and it appears from the opinion that on December 11, 1875, the real estate was conveyed to the defendants, Dulin and Moore, subject to two trusts. The trustees under the first trust were Warner and Morrison. On April 6, 1876, the complainants recovered a judgment against Dulin and Moore and thereafter on May 16,

1876, filed a Bill in Equity praying that a trustee be appointed to sell the real estate and distribute the proceeds according to law. Thereafter on September 26, 1876, Warner and Morrison, the trustees, filed their answer, stating that under the trust they had sold the premises to one, Gatchell, on June 14, 1876. The lower court removed the trustees and appointed one, James M. Johnston, as substituted trustee. The trustees thereupon appealed and the Court said, in reversing the lower court, as follows:

“I am also of the opinion that it is not competent for a court of equity, at the instance of a subsequent incumbrancer, to divest trustees under deeds of trust of the title to property vested in them by parties competent to contract, for a particular purpose, upon special confidence and with certain discretionary powers, and to substitute in their place, without their consent and of all interested in the premises, any other person or persons to make a sale of the property or to execute the trust, in the absence of fraud, incompetency, misconduct, irregularity, or the like. In this case no such consent appears, and there is not even an intimation or suspicion of any misconduct, incompetency, or irregularity on the part of the gentlemen who made this sale.

Deeds of trust to secure debts are recognized in law as valid, and the authority granted to the trustees and its exercise are matters which rest wholly upon the convention of the parties thereto, and the contract and the rights of the parties thereunder cannot be disturbed by either a court of equity or of law, except upon certain well-known principles which govern all contracts.

The court cannot by main strength lay hold of trustees under deeds of trust and divest them and other parties interested of their rights and powers thereunder.

In the case of *The Bank of the Metropolis v. Guttschlick*, 14 Peters, p. 19, it was held that in the case of a deed of trust, unless in case of some extrinsic matter of equity, a court of equity never interferes; and the only right of the grantor in the deed is the right to whatever surplus may remain, after sale, of the money for which the property sold."

Assignment to Insurance Company.

The appellee alleged in her petition that the appellants did not have the right to make the assignment to the insurance company as being contrary to the Deed of Trust and Section 522 of the D. C. Code (R. 3). A mere glance at Section 522 of the D. C. Code and the policy of insurance proves this statement entirely unwarranted. Section 522 of the Code contains no such prohibition, but merely provides that title conveyed to a trustee "shall be construed and held to be a qualified fee simple, determinable upon the release of the mortgage or deed of trust," and the Deed of Trust provided that the appellee shall keep the premises insured against loss by fire in the full sum of \$4100.00 in the name and to the satisfaction of the appellants (R. 9 and 10), and the policy of insurance given to the appellants under this Deed of Trust, and in compliance therewith, provided that the loss under said policies shall be paid to appellants as trustees and that "this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, * * *, nor by any change in the title or ownership of the property" (R. 33). So, it would appear that the insurance company would have a defense against the owner, the appellee, if she had been

guilty of neglect or had, in fact, caused the fire, or had transferred title or ownership to the property. There was a fire, and the insurance company claimed that it was of an incendiary origin (R. 25), and there was a transfer of title to one, Leon Williams on, to wit, March 21, 1932 (R. 12). In any event, however, the trustees were bound by the terms of the insurance policy which provided:

"Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefore existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to cover the full amount of (his, her or their) claim." (R. 33.)

And further:

"On payment to such mortgagee of any sum for loss or damage hereunder, if this Company shall claim that as to the mortgagor or owner, no liability existed, it shall, to the extent of such payment, be subrogated to the mortgagee's right of recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue; or it may pay the mortgage debt and require an assignment thereof and of the mortgage." (R. 32.)

And further:

“This Company may require from the insured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this Company.” (R. 32)

The foregoing provisions of the fire insurance policy are the standard mortgage clauses generally incorporated in such policies, and the Courts have uniformly held them to be valid. In the case of *Hare v. Headley, et al.*, 54 N. J. Eq. 545, the mortgage clause was similar to the one in this case, and the Court, in speaking of its validity, said:

“Mortgage clauses, so called, continuing the insurance covered by a policy in favor of a mortgagee, when they are void as to the owner or mortgagor by reason of his acts or defaults, have for many years been used and acted on in connection with policies, and where the clause is either incorporated in the policy itself, or otherwise attached by the consent of all parties (owner, mortgagee and insurance companies), no plausible ground can be urged against their validity, *and the uniform opinion of the courts has sustained them.* The reason is that the interest and relations of the mortgagee and of the owner to the insured property, are, in some respects and to a certain extent, so distinct that the parties being competent to make the contract, may provide that the policy may be good to the mortgagee although not to the owner (Authorities).”

In the case of *Mosby v. Aetna Ins. Co.*, 285 Mo. 242, 225 S. W. 715, the court, in speaking of similar provisions as contained in the policy in the case at bar, said:

“Neither positive law nor considerations of public policy prevent the making or enforcement of a

contract provision of this sort. We see no reason why the parties are not free to enter into such an agreement if they see fit. The authorities, in cases in which the facts are such as those in the case at bar, are quite one way. They uphold and enforce the agreement."

A similar provision of a policy was construed in the case of *Insurance Co. of N. A. v. Martin*, 151 Ind. 209, 51 N. E. 361, where the Court said:

"The provisions of the contract created by the mortgage clause in question also provided for subrogation in the event the policy was invalidated as to the interest of the mortgagor or owner. An examination of this clause will disclose that the agreement therein relative to this feature of the case, in substance, is that whenever appellant (insurance company) paid to the mortgagee any sum for loss under the policy, and denied its liability as to the mortgagor or owner of the property, appellant at once, to the extent of such payment, became legally subrogated to all the rights of the mortgagee in and to all securities held by it for the payment of such debt, etc. It is evident, we think, that one of the conditions or considerations which actuated appellant to agree to waive, among others, the provision relative to the alienation of the property, and to agree to pay the indemnity to the mortgagee regardless of the change of title, was the stipulation or agreement contained in the mortgage clause for its subrogation or substitution to all the rights of the mortgagee in the debt and mortgage lien, to the extent of any sum paid to the mortgagee under the policy for the loss of the property by fire. The contract, in effect, provided that after the policy had been invalidated by alienation of the property, the indemnity therein provided should remain wholly for the benefit of the mortgagee, and that neither the mortgagor,

nor those claiming title to the property through him, in the absence of an assignment, should be entitled to any beneficial interest therein, and that payment of the loss to the mortgagee should not be a discharge of the mortgage indebtedness, but such payment should at once legally operate to subrogate, pro tanto, appellant to the rights of the mortgagee in the mortgage debt, and the mortgage lien as security; or appellant, at its option, had the right to pay the entire debt to the mortgagee, and thereby succeed to all the rights of the latter through an assignment; or, in other words, the provisions of the mortgage clause, under the circumstances, were to the effect that the amount due for the loss of the property, after the transfer of its title, should not be a fund to be applied as a payment upon the mortgage debt, for the benefit of the mortgagor or owner of the insured property, but that on payment of the loss to the mortgagee, the indebtedness, to the extent of the loss paid, should remain and be deemed a fund for the reimbursement of appellant as the insurer."

And in *Allen v. Watertown F. Ins. Co.*, 132 Mass. 480, the Court said:

"The policy in the case at bar seems to have been drawn expressly to meet the decision in *Graves v. Hampden F. Ins. Co.*, 10 Allen (Mass.) 281. After specifying matters which shall render the policy void, it provides that the insurance, 'as to the interest of the mortgagee only therein,' shall not be invalidated by acts of the mortgagor, and that, when a loss after forfeiture is paid to the mortgagee, the company shall be subrogated to his rights under the mortgage to the extent of such payment, and may pay the full amount of the debt to the mortgagee and require an assignment of

the mortgagee. In other words, the policy provides that the amount due for a loss after a forfeiture shall not be a fund for the payment of the mortgage debt, but that, upon payment of the loss, the mortgage shall be a fund for the reimbursement of the defendant. The contract is that after a forfeiture the insurance shall be exclusively for the benefit of the mortgagee; that the mortgagor and those claiming under him shall have no beneficial interest in the policy; and that payment to the mortgagee shall not discharge the mortgage, but subrogate the defendant to the mortgagee's right in it. It was a contract which the parties were competent to make, and we know no reason that they should not abide by it."

It would, therefore, appear from the foregoing that the trustees had, not only the right and authority to make the said assignment, but it was their duty so to do. Especially, since the Receiver for the bank and the Comptroller of the Currency requested it (R. 25). Furthermore, the amount received was applied upon appellee's indebtedness in accordance with the provisions of the Deed of Trust which provided that the trustees "shall apply whatever may be received therefrom (insurance) to the payment of the matter hereby secured, whether due or not" (R. 10).

It is also respectfully contended that any argument or dispute between the insurance company and the appellee should be fought out between them in a proper action. Furthermore, the appellee should not have waited more than four years after the fire and after the trustees had been ordered by the bank to foreclose the trust and had advertised the property for sale, to question the validity of these assignments, particularly, in a case in which the insurance company is not a party.

There Was No Tender.

The appellee in her petition alleges that she has sufficient money on deposit with the District Title Company to settle in full all claims "which the receiver of the Northeast Savings Bank, * * * claims is due the Bank" (R. 2 and 3). She very carefully refrains from saying that the amount would be sufficient to satisfy all obligations under this trust, but limits her allegations to all claims that the Receiver has under the trust. This ignores entirely the claim of the Continental Insurance Company and of the trustees. The insurance company has a claim of \$725.00, plus interest thereon from October 24, 1934, and the trustees are entitled to their commission, advertising and auctioneer expenses for two sales and attorney's fee as provided in said Deed of Trust (R. 6). However, even if we assume that she did actually allege that she had on deposit in the said title company sufficient cash to extinguish all obligations under the trust, even then she could not change the fact that these obligations are still overdue and unpaid. Her allegation that the money was on deposit in the title company would be no different than if she said it was on deposit in some bank. She does not allege that she has paid the charges secured by the Deed of Trust, or made a valid tender of the same. If the money is at the title company, it will be held subject to one or more conditions. Until she has paid her obligations, or made a valid tender of the same, she has no standing in equity. This Court so held in the case of *Annapolis Company v. Harry Wardman et al.*, 59 App. D. C., 321; 58 WLR 399, where the Court said:

"Applying the rule to the plaintiff company in this case, it is here confessing the debt and at the

same time seeking in a court of equity relief against its collection by the enforcement of the security given to insure its payment. Until tender of the payment of the debt is made, *appellant is without standing in equity* and the decree of the court below can be sustained on this ground alone."

Furthermore, when default occurs under a Deed of Trust and the party secured makes demand upon the trustees to sell the equity, they have no discretion in the matter. Their duty is to sell, and so long as they remain trustees they cannot avoid that duty. This Court said in the case of *Wheeler v. McBlair et al.*, 5 App. D. C., 375; 23 WLR 153, affirmed in 172 U. S. 643, as follows:

"As before said, we cannot agree with the appellant in the view taken of the discretion vested in trustees of this character. 'Their duty is to sell after default, upon the demand of the security holder, in the manner and upon the notice prescribed in the trust. They cannot sell upon holidays, or at unusual or unreasonable hours; but they have no right, on the other hand, to refuse to sell until some time in the future that may be more satisfactory or advantageous to the mortgagor. Appeals for delay to a more favorable or convenient season must be made to the creditor. The terms of the instrument measure the powers and prescribe the duties of the trustee.' *Anderson v. White*, 2 App. D. C., 419; 22 WLR 159."

And in *Anderson v. White* (2 App. D. C. 419; 22 WLR 159):

"It must be borne in mind that we are here discussing sales made under the ordinary trusts to secure loans, and enforceable upon stipulated

terms and notices at the demand of the creditor or holder of the secured debt. Another and different rule applies to cases of sales under trusts of a different character, such as trusts to sell for partition or distribution and the like, and it is this rule which the authorities cited on behalf of appellant, in the main, support, without trenching upon the operation of the other. The discretion reposed in the trustees in the one case is widely different from that in the other. In the one they are charged with the duty to so arrange for the sale without unnecessary delay as to secure the highest possible price for the property; this being the object of the trust and the interests of the beneficiaries being identical. But this discretion is entirely wanting in the other. Their duty is to sell after default, upon the demand of the security holder, in the manner and upon the notice prescribed in the trust. They cannot sell upon holidays, or at unusual and unreasonable hours; but they have no right, on the other hand, to refuse to sell until some time in the future that may be more satisfactory or advantageous to the mortgagor. Appeals for delay to a more favorable or convenient season must be made to the creditor. The terms of the instrument measure the powers and prescribe the duties of the trustees. It remains to consider the principles which have been discussed in application to the facts alleged in the bill."

In their answer, the appellants show that whatever funds, if any, appellee has at the title company, are subject to a condition, that is, that she give a first trust to secure the same (R. 22). Consequently, until the title to this property is cleared, the title company could not disburse these funds, and the record discloses that in previous litigation between this appellee and one, Leon Williams, and in which the Receiver for

the Northeast Savings Bank and appellants were also parties, the Court gave to the said Leon Williams a lien against said property for money expended by him on said property (R. 14). Therefore, until this lien was satisfied, as well as the obligations under this trust, appellee was in no position to give a new trust secured on this real estate. Therefore, there was a grave doubt as to when, if ever, the title company would disburse these funds. The party who owned the funds and who was making the loan might withdraw the same at any time. The answer of the appellants also disclosed that the deposit with the said title company consisted of nothing more than an uncertified check, the net amount of which was approximately \$5404.00, to extinguish claims of \$6,471.89, exclusive of the lien of the said Leon Williams.

Cancellation of Assignment to Continental Insurance Company.

It is also respectfully contended that the Court erred in cancelling the assignment made by the appellants to the Continental Insurance Company for the reason the said insurance company was not a party to this suit. So far as the appellants are personally concerned, it would be immaterial to them whether they paid the \$725.00 to appellee, or to the insurance company. However, in any event, they are entitled to be protected so that payment to one will release them of further responsibility and not subject them to a suit by the other party. Obviously, the cancellation of this assignment would not be binding upon the insurance company since it has not been joined in this action.

It is difficult to see how the Court could cancel a contract, when the only party to said contract who had any

interest whatever in maintaining the same was not before the Court. This court, in the case of *Roberts v. Bradfield*, 12 App. D. C., 453; 26 WLR 242, said, in speaking of a similar case, as follows:

“1. The record does not show that objection was made to the bill for want of necessary parties defendant; and neither that question, nor the right of the complainant to maintain the suit as a taxpayer of the District of Columbia, are noticed in the opinion of the learned justice who presided below.

The Treasurer of the United States, who alone was made a party, has no interest whatever in the controversy.

He is an officer of the United States, having custody among other money, of that raised by taxation in the District of Columbia, and is charged with the ministerial duty of paying out the same upon claims and requisitions duly certified to him by the proper officers under the necessary appropriations made by Congress.

It is under this view of his duty in the premises, alone, that his action in any matter could be compelled by mandamus or restrained by injunction. *Noble v. Union River R.*, 147 U. S. 165, 172.

The persons directly interested in defending this suit are the parties to the contract which the plaintiff seeks to annul. They are the Commissioners of the District, on the one hand, who have acted in the performance of a duty imposed by law; and the Providence Hospital, on the other, which has promised a consideration valuable in law.

Had objection been made on account of their nonjoinder the trial court would, no doubt, have ordered the plaintiff to make them parties defendant, under the penalty of dismissal of his bill.

The defect being palpable and having been pressed upon our attention on the argument, we

have no doubt of our power—indeed, it is questionable if it is not our duty—to reverse the decree because of the omission of the plaintiff to bring into the controversy the parties aforesaid who are directly and substantially interested in the result. *California v. Southern Pacific Co.*, 157 U. S. 229, 255; *N. O. Water Works Co. v. New Orleans*, 164 U. S. 471, 480.”

And in *New Orleans Water Works Co. v. New Orleans*, 164 U. S., 478, 41 L. Ed. 518, 523, the Court said:

“A decree declaring the ordinances in question void would have no effect in law upon the rights of the beneficiaries named in the ordinances; for in the absence of the parties interested and without their having an opportunity to be heard, the court would be without jurisdiction to make an adjudication affecting them. Such a decree would appear, upon the very face of the record, not to be due process of law, and could be treated everywhere as a nullity. *Windsor v. McVeigh*, 93 U. S. 274, 277; *Pennoyer v. Neff*, 95 U. S. 714-733; *Scott v. McNeal*, 154 U. S. 34, 36.”

One of the leading cases on the question of parties is the case of *Shields v. Barrow*, 17 How. 129, 139. In this case, the Court defined indispensable parties, as follows:

“Persons who, not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such condition that its final termination may be wholly inconsistent with equity and good conscience.”

In the recent case of *Balter et al. v. Ickes et al.*, 67 App. D. C., 112; 65 WLR 847, this court also said:

“All whose interests will be affected by the decree, that is, all persons materially interested either legally or beneficially in the subject matter of the suit, must be made parties. *Ribon v. Railroad Companies*, 16 Wall. 446, 450; *Commonwealth Trust Co. v. Smith*, 266 U. S. 152, 158.”

and further, the Court said:

“This is not a suit by one of the parties to the contract, seeking to annul it, but by third parties, asserting a somewhat questionable interest, who attempt to defeat the carrying out of the agreement. It follows, we think, that before any final decree adjudicating the issues can be entered, all the parties to the contract must be before the court and be given an opportunity to be heard.”

See also, *Green v. McIntyre et al.*, 39 App. D. C., 249; 40 WLR 750.

It would seem obvious, therefore, that before the Court can adjudicate the rights of the Continental Insurance Company and pass a final decree that would protect the trustees in disbursing any funds under this trust, it would be necessary that the said insurance company be before the Court and given an opportunity to be heard.

In conclusion, it is respectfully submitted that the appellants have attempted to do nothing more than perform the duties of their office as trustees, and that the decree of the lower court in removing them as trustees, should be reversed.

S. J. L'HOMMEDIEU,
Attorney for Appellants.

**United States Court of Appeals for the
District of Columbia**

APRIL TERM, 1938.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

No. 7216 FILED NOV 4 - 1938

JAMES B. FLYNN, Trustee, and *Joseph W. Stewart* GEORGE F. HOOVER,
Trustee, CLERK
Appellants,

vs.

ELIZABETH BROOKS,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

THURMAN L. DODSON,
HORACE O. POLLARD,
Attorneys for Appellee.

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CASES CITED.

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IN THE
**United States Court of Appeals for the
District of Columbia**

APRIL TERM.

Number 7216.

JAMES B. FLYNN, Trustee, and GEORGE
F. HOOVER, Trustee,
Appellants,

vs.

ELIZABETH BROOKS,
Appellee.

**Appeal From the District Court of the United States
for the District of Columbia.**

BRIEF FOR APPELLEE.

Statement of the Case.

This case had its genesis in a petition filed in the lower court, under certain statutory provisions, seeking the removal of the appellants as trustees under a certain deed of trust. The petition alleged, among other things, that the plaintiff and her children were the equitable and beneficial owners of two certain parcels of real estate situated on Kenilworth Avenue, Northeast; that in 1931, the plaintiff and her children had placed upon the property a trust, securing a loan from the Northeast Savings Bank, which is now represented by its successor, the Receiver of the Northeast Savings Bank. The petition sets out further that there had

come a time when the plaintiff was desirous of settling her obligations to the bank, and that although she was ready, willing and able to meet all the demands of the Receiver, the then holder of the trust notes, and all demands by virtue of the final decree in Equity 63-558, yet, notwithstanding the trustee, appellants had refused to release said trust unless the plaintiff paid, in addition to the demands of the noteholders and the final decree in Equity No. 63-558, a sum of Seven Hundred and Twenty-five Dollars (\$725.00), together with interest thereon at the rate of six per centum (6%) per annum, then amounting to One Hundred and Forty-nine Dollars and Eight Cents (\$149.08), pursuant to an alleged assignment entered in between the trustees (appellants) and a certain fire insurance company. The record discloses no authority in the deed of trust for any such assignment (Record, pp. 5-10, incl.). It was never suggested that either appellee or her children had been responsible for the fire. The final decree in Equity 63-558 confirmed title in her and her children from 1931 until time of decree. The appellee also objected to the amounts of commission claimed by the trustees and the commission claimed by the trustees for the auctioneer. Both sums were calculated upon the basis of a sale which the Court below had set aside in the final decree in Equity 63-558.

Because of these matters, therefore, the petitioner below, appellee here, filed her action pursuant to Section 538 of the D. C. Code (Old Code), taking the position that the action of the trustees (appellants) in invoking the assignment and demanding repayment with interest, was tantamount to borrowing money on the trust estate, which obviously trustees may not do.

ARGUMENT.

I.

Hostility.

The hostility of the appellants is a matter of record. Appellee contends that the act of the appellants interfered with a just and proper discharge of their fiduciary duties, that by reason of the assignment made by appellants (R. 28-29-30), they had asserted an interest in the security, and had refused (R. 25) to release said trust unless they were reimbursed. It is also apparent (R. 25-26) that appellants failed and/or refused to negotiate with the insurance company, after notice from appellee that they denied appellants' claim.

Also, when suit had been filed in this case, appellants could have had a hearing prior to the sale if they so desired, because (R. 1) shows that the petition seeking their removal was filed on March 19, 1938. That as early as March 25, 1938 (R. 28), which was three days prior to date of sale (R. 22-27), the answer filed in this cause had been prepared and acknowledged. This answer was not filed until March 28, 1938 (R. 22), and a copy was not received by appellee's counsel until March 29, 1938, which was the day following the sale. On a day subsequent arguments of counsel were heard. The (R. 27) also shows that appellants had postponed sale at the request of the noteholder (R. 27), yet when a suit was pending seeking their removal appellants paid no attention to this, and proceeded with the sale. These facts also show that appellants were not acting in a disinterested manner and that they were decidedly hostile to interest of appellee.

In *Heckman vs. Detlaff*, 119 N. E. 639, the Court said:

"The doctrine of *lis pendens* as to persons or property within its operation is that the court having jurisdiction of the suit or action is entitled to proceed to the final exercise of that jurisdiction, and that it is beyond the power of any parties to the action to prevent its so doing by any transfer or other act made or done after the service of the writ or the happening of such other act as may be necessary to the commencement of the *lis pendens*."

And in *Clark vs. Simmons*, 150 Mass. 357, the Court said:

"A mortgagee owed a duty of good faith and to use reasonable diligence to protect rights of mortgagor."

This rule should be intensified where the trustee who is a representative of both parties, has his authority questioned.

And in *White vs. MacQueen*, 195 N. E. at page 836, the Court said:

"The power of the court of equity to remove a trustee in a proper case for breaches of trust, misconduct or disregard of his fiduciary duties cannot be doubted. Such power grows out of the inherent power of that court over trustees—a court of equity always has power to correct misconduct of a trustee and to remove him for direct violations of his fiduciary responsibilities."

And further at page 837:

"Trustees under a deed of trust represent the mortgagor as well as the mortgagee and he must act fairly toward both parties to the instrument and not exclusively in the interest of one. He is required to act fairly to the debtor or those having derived title from the debtor and who have an interest in the property."

And in *Irvine vs. Dunham*, 111 U. S. at page 335, the Court said:

“No trustee can be more unsuitable than one who not only refuses to act, but denies the trust.”

And in *McDonald vs. O'Donnell*, 56 App. D. C. 31, the Court said:

“A decree removing trustees not disturbed save on clear and convincing grounds.”

II.

The assignment was void as a lien under the deed of trust.

The appellee alleged in her petition (R. 3) and now contends that the appellants had no right or authority to make the assignment to the insurance company because it was done in violation of Section 522 of the D. C. Code, which provides that the title conveyed to the trustees “shall be construed and held to be a qualified fee simple determinable upon the release of the mortgage or deed of trust.”

And in the case of *Marshall vs. Krach*, 23 App. D. C. 205, where Section 522 was construed, the Court said:

“It is recognized that a legal estate is conveyed by such mortgage or deed of trust to the trustee yet it is designated everywhere as a determinable fee and the barrenness of such an estate is everywhere emphasized throughout the provisions bearing upon the subject. Courts have from time immemorial recognized that the estate of the trustee is a legal title without any beneficial interest whatsoever and they have always held the legal title in strict subordination to the beneficial interest of the debtor and creditor in the

transaction. 'They have never hesitated to remove trustees, to divest them of their legal title whenever the beneficial interest required it.'

And in *Anderson vs. White*, 2 App. D. C. 408, the Court said:

"The duties and powers of trustees are prescribed in the trust which creates them."

And in *Mutual Benefit Ins. Co. vs. Swett*, 222 F. 200, the Court defined an assignment as:

"The transfer by one of his right or interest in property to another."

The trust (R. 9, 10) contains no provisions for an assignment to the insurance company by the trustees (appellants).

The appellants rely upon the terms of the insurance policy (R. 30-32) as giving them authority to make the assignment of mortgage interest. This contention is without force because the terms of the insurance policy cannot enlarge the powers of the appellants, as the powers and duties of the appellants were prescribed in the trust which created them. *Anderson vs. White* (*supra*). Nor can the contention of the appellants have any greater force because they say it was done at the request of the Receiver and the Comptroller of the Currency; however, the (R. 25) which is referred to by the appellants says it was done with the consent of these parties in contradistinction to request.

And in *Holmes vs. Ryon*, 61 App. D. C. 10, the Court said:

"A trustee named in a deed of trust to secure a loan sustains a fiduciary relationship to the debtor as well as to the creditor."

Apparently, appellants misconceive the issue here in-

volved from the cases cited in their brief. We do not deny the validity of mortgage clauses generally incorporated in fire insurance policies, but we deny the authority or right of a trustee under a deed of trust in the District of Columbia—whose title is set forth in Section 522 of D. C. Code as a qualified fee simple; whose title has been construed to be a legal title without beneficial interest in *Marshall vs. Kraoch* (*supra*); whose powers and duties are prescribed by the deed of trust (*Anderson vs. White, supra*), to make an assignment of mortgage interest, and seek to rely on the terms of an insurance policy which does not prescribe his powers or duties, as authority for his acts.

The (R. 28-29-30) will show that both of these assignments were entered into by the trustees, appellants, with the Continental Fire Insurance Company, and that in neither instance was the mortgagee (the Receiver) a party to either agreement.

III.

Tender was not necessary.

The appellee's petition is very plain. It alleges in (R. 2 and 3) that appellee has now sufficient money on deposit in the District Title Company to settle in full all claims which the receiver of the Northeast Savings Bank, the present owner and holder of the aforesaid trust notes, claims is due the bank under the terms of the aforesaid trust and in accordance with the final decree in Equity 63-558, which decree is hereby incorporated herein by reference and again in paragraph 7 of appellee's petition (R. 3):

“The plaintiff stood ready, willing and able to

discharge everything required of her by the note-holder and in accordance with the final decree in Equity Cause 63-558."

These allegations were made without equivocation and it is apparent by the record that the appellee did not limit her claim to those of the Receiver, but was cognizant of the claims of the trustees (appellants) for commissions, advertising, auctioneers' fees and attorneys' fees.

While admitting these claims, appellee did deny in her petition, paragraph 6 (R. 3), the validity of the appellants' claim for \$725 and \$149.08 interest and in appellants' answer (R. 25), they assert the right to make said assignment and to the sum of \$725.00 plus \$149.08 interest and that they wouldn't release said deed of trust unless appellee paid all charges under said deed and in accordance with decree in Equity 63-558. By reason of these circumstances, it is clear that there was no necessity for tender as it is evident that any sum tendered the appellants which did not include the \$725 and \$149.08 claimed by them as protection from an assignment which they had made with the Continental Fire Insurance Company, would be unsatisfactory and would not secure release of deed of trust.

And in *Lewis vs. Lee*, 130 N. E. 443, the Court said:

"This act of appellant in refusing to convey the real estate, except upon a condition not required by the contract, amounted to a waiver of a tender by the appellee, if any, would be required" (authorities).

And further 6 R. C. L. 624, it is said,

"the law does not require one to do a vain thing, a formal tender is never required where it appears that if it has been made the money would not have been received."

In this connection it is important for the Court to understand that, even though the noteholder had received every sum he claimed was due and the appellants all sums which appellees admit were due by virtue of the decree in Equity 63-558, the payment of all of these items would not have been sufficient to cause a reconveyance of the property to the appellee, because the appellants were demanding a sum, in excess of that permitted by terms of the trust.

While the Courts have held that a trustee has no discretion as to the matter of sale after the noteholder has requested same this Court has also held in *Holmes vs. Ryon*, 61 App. D. C. 10, that a trustee must scrupulously avoid placing himself in a position where his interests conflict with those of the parties he represents.

Here the interest of the appellants conflicted with those of both the appellee and receiver.

IV.

There was no cancellation of assignment to the Continental Insurance Company.

It is respectfully urged that the Court was not asked to and did not *cancel* the assignment of the trustees, appellants, to the Continental Insurance Company. The Court made no ruling upon the validity of the assignment as between the appellants and the insurance company. The Court simply held that it was "null, void and of no effect, as a *lien*" (R. 35, 36) under the deed of trust in this case. The guide as to scope of the authority of the trustees must be the instrument creating them. Judged by this standard it is apparent that no such authority, as to permit the trustees to make

such an assignment, exists in the deed of trust. Under these circumstances it was unnecessary that the insurance company be brought in.

CONCLUSION.

It is respectfully urged, in conclusion, that in as much as there was no authority in the trust deed for an assignment such as made in this case, and that the demand for repayment of the indemnity paid plus interest amounted to a loan negotiated by the trustees, they (the trustees) had violated the terms of the deed of trust and by their insistence upon the repayment, demonstrated a hostility which justified their removal. The decree of the lower Court should, therefore, be affirmed.

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